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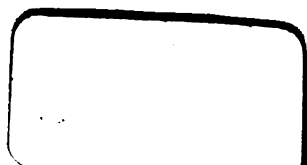
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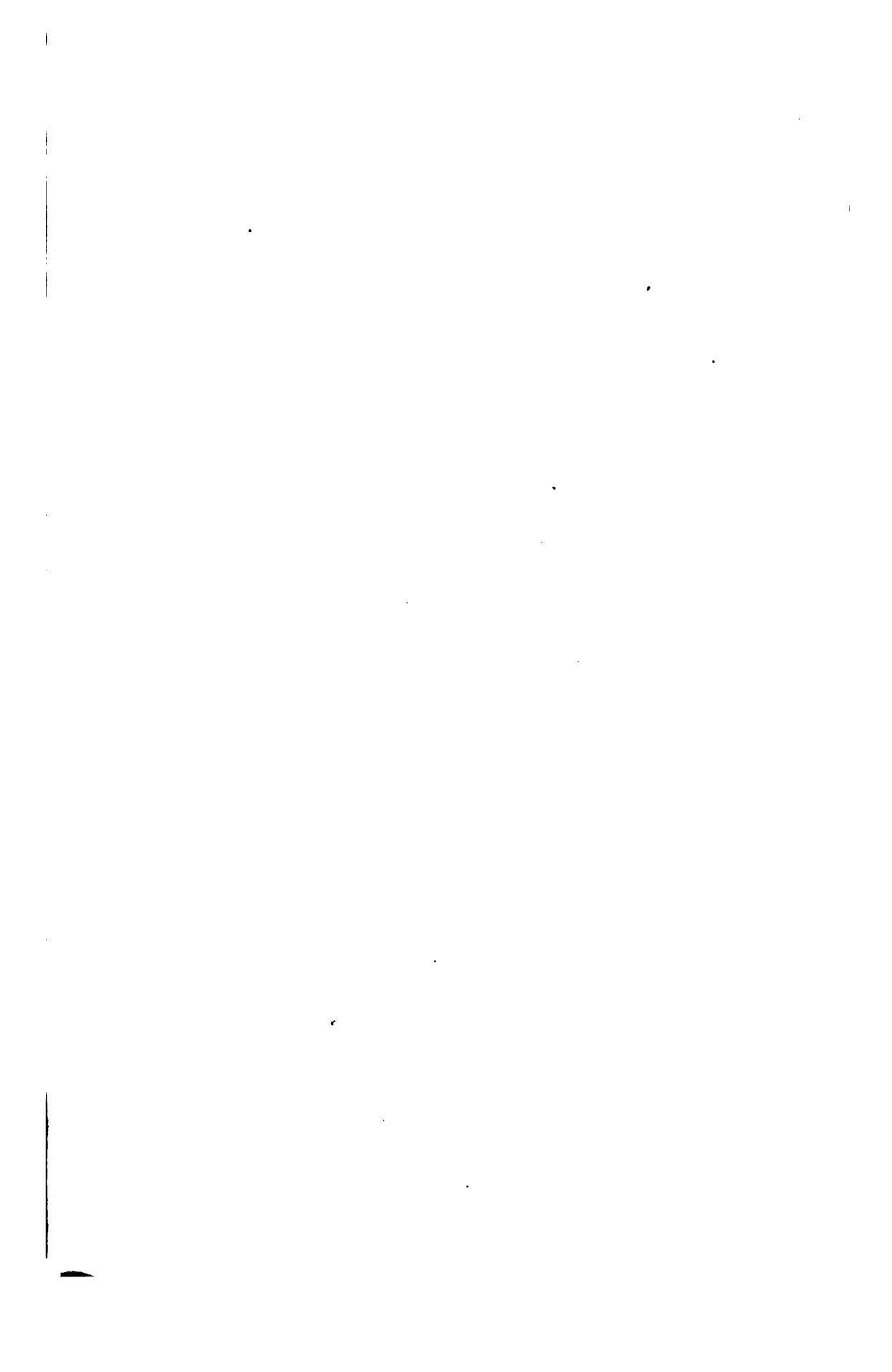
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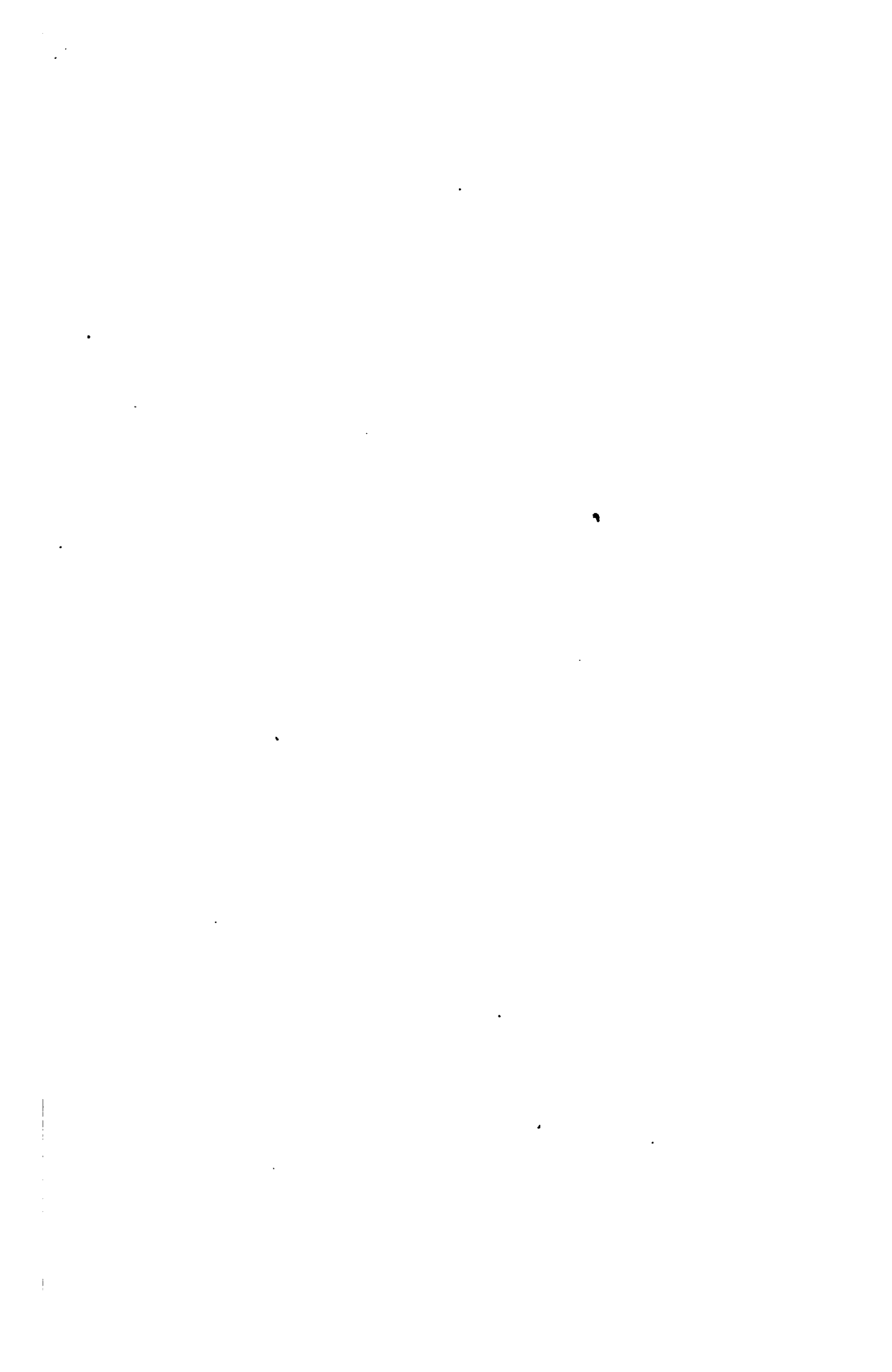
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REPORTS OF CASES

UNDER THE

BANKRUPTCY ACT, 1883,

DECIDED IN THE

High Court of Justice & The Court of Appeal.

REPORTED BY

CHARLES FRANCIS MORRELL,

Of the Middle Temple, Barrister-at-Law.

VOL. V.

COMPRISING CASES DECIDED DURING THE YEAR 1888,

TOGETHER WITH

A Complete Digest and Index.

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REPORTS OF CASES

DECIDED UNDER THE

BANKRUPTCY ACT, 1883.

IN RE GARDINER, EX PARTE COULSON.

Bankruptcy Act, 1883, section 4, sub-section 1 (g), and section 152,

Bankruptcy Notice—Married woman not carrying on separate trade—Liability to Bankruptcy Laws—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), section 1, subsection (5).

Held: That a married woman who does not carry on a trade separately from her husband is not subject to the bankruptcy laws; and a bankruptcy notice under section 4, subsection 1 (g) of the Bankruptcy Act, 1883, cannot be served upon her.

DIVISIONAL
COURT.

BEFORE
CAVE, J.

AND
A. L. SMITH, J.
1887.

Nov. 22nd.

THIS was an appeal from an order of the Registrar of the County Court at Kingston-on-Thames, dismissing, with costs, a bankruptcy notice served upon Mrs. *Gardiner*, a married woman.

In August, 1886, Mrs. *Gardiner* accepted a bill of exchange for 60*l.*, drawn by one *Foulkes*, payable three months after date.

This bill became the property of *Coulson*, the present appellant, and default having been made in payment, an action was, in November, 1886, commenced by him against the drawer and acceptor, which was defended by Mrs. *Gardiner*.

On April 19th, 1887, however, a verdict was given in favour of the plaintiff, and judgment was obtained as against a married woman in the ordinary form—viz., that the plaintiff recover the above sum against the defendant, but that execution be limited to her separate estate not subject to any restraint on anticipation (unless by reason of section 19 of the Married Women's Property

1887.
IN RE
GARDINER,
EX PARTE
COULSON.

Act, 1882, such estate should be liable to execution notwithstanding such restraint).

In June, 1887, a bankruptcy notice was issued against Mrs. Gardiner under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, and an affidavit was thereupon filed by her, whereby she stated that she was married to her present husband, *Theodore Gardiner*, on October 7th, 1879, and that she did not carry on any separate trade or business.

The bankruptcy notice was dismissed by the County Court Registrar, with costs.

From that order of dismissal *Coulson* now appealed.

Winslow, Q.C. (Pyke with him): for Mr. Coulson.

Section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, provides that a debtor commits an act of bankruptcy "If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him . . . a bankruptcy notice under the Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it, &c." And by section 152, "Nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882." Here there is a final judgment for a particular amount, and execution has not been stayed.

[A. L. SMITH, J. Do you say that you can make a man a bankrupt under the section if you have not got a personal judgment against him?]

The petition which follows this bankruptcy notice is not a petition in bankruptcy. It is a petition for a receiving order, and a receiver is thereby appointed. It seems clear that in an action we could have a receiver, and why may there not be a general receiver appointed by this means? By section 1 of the Married Women's Property Act, 1882, a married woman is capable of holding property and of contracting as a *feme sole*, and by sub-section (5) of that section 1—"Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a

feme sole." It is not necessary to push this case so far as to consider whether it is possible to make this woman a bankrupt or not; but there is really nothing either in the Bankruptcy Act or the Married Women's Property Act to prevent a married woman being made a bankrupt *quâ* her separate estate. (Counsel referred to *In re Morley*, *Scott v. Morley*, see *ante*, Volume IV., p. 286; L. R. 20 Q. B. D. 120; 36 W. R. 67; *Dillon v. Cunningham*, L. R. 8 Ex. 23; 42 L. J. Ex. 11; 27 L. T. 820; *Ex parte Jones*, *In re Grissell*, L. R. 12 Ch. Div. 484; 28 W. R. 287.)

1887.
IN RE
GARDINER,
EX PARTE
COULSON:

Herbert Reed: for Mrs. Gardiner, was not called upon.

CAVE, J.:

This is an appeal against an order of the Registrar of the Judgment. Kingston County Court setting aside a bankruptcy notice which had been served on Mrs. Gardiner. It is not disputed that Mrs. Gardiner is a married woman, or that she is not carrying on a separate trade, and it is quite clear that on two grounds what has been attempted here is entirely wrong. Previous to the year 1882, it was held in the case of *Ex parte Jones*, *In re Grissell* (L. R. 12 Ch. Div. 484), that "A married woman is not liable to the bankrupt law, even though she has separate estate, and has contracted engagements after her marriage." It had also been held that under the custom of London a married woman who traded on her sole account, could be adjudicated bankrupt. When the Married Women's Property Act, 1882 was passed, it was enacted by section 1, sub-section (5), that "Every married woman carrying on a trade separately from her husband, shall in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*." That was intended to extend the custom of London to the realm generally, and confined the power of making bankrupt to the case of a married woman who is carrying on a separate trade. The result is that a married woman who does not carry on a separate trade, is not subject to the bankruptcy laws. That is a conclusive answer to the present proceeding. But there is a further one. It has been held more than once by the Court of Appeal, that section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, must be construed with strictness, and it must not be

1887.
IN RE
GARDINER,
EX PARTE
COULSON.

extended to cases which are not strictly within it. Section 4, sub-section 1 (g) says "If a creditor has obtained a final judgment against him for any amount, &c." Now I am clearly of opinion that this was not a final judgment against Mrs. Gardiner. There was no personal liability on Mrs. Gardiner, and the creditor has obtained judgment not against her but against her estate. The point was well pointed out by Lord Justice BOWEN in the recent case of *Scott v. Morley* (see *ante* Volume IV., p. 286). But if there was any doubt on this subject, it is cleared up by what follows. A debtor served with a bankruptcy notice, is required "to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it, &c." Now there is no personal obligation on the debtor to pay the debt. There is no debt due from her which could be enforced under section 5 of the Debtors Act, 1869. There is no liability to secure or compound for it. On either of the grounds I have stated, it appears to me that the decision of the registrar could be upheld, and the appeal must therefore be dismissed with costs.

A. L. SMITH, J.:

I am of the same opinion.

Appeal dismissed with costs.

Solicitors: *Pyke & Minchin*, for Mr. Coulson.

Mear & Fowler, for Mrs. Gardiner.

Cases referred to:—

Ex parte Jones, *In re Grissell*, L. R. 12 Ch. Div. 484.

Scott v. Morley, see *ante* Volume IV., p. 286; L. R. 20 Q.

B. D. 120; 57 L. J. Q. B. 43; 36 W. R. 67.

Dillon v. Cunningham, L. R. 8 Ex. 23; 42 L. J. Ex. 11; 27

L. T. 820.

PRACTICE.

IN RE BAKER, EX PARTE BAKER.

*Bankruptcy Act, 1883, section 4, sub-section 1 (d), and section 6.**Act of Bankruptcy—Departing from Dwelling House—Purchase of debt on which to found petition—Bond fide purchase for purpose of obtaining distribution of assets—Validity of petition.*DIVISIONAL
COURT.BEFORE
CAVE, J.
ANDA. L. SMITH, J.
1887.

December 6th.

The purchase of a debt in order to found a bankruptcy petition upon it does not necessarily constitute under all circumstances an abuse of the process of the Bankruptcy Court.

Where, however, the bankruptcy law is put in force for an illegitimate purpose, and the Court sees that such petition is presented, not with the *bond fide* view of obtaining an adjudication, but for some collateral purpose, or with the view of putting pressure on the debtor, it will refuse to make a receiving order.

But where a debtor committed an act of bankruptcy by departing from his dwelling-house, and the debt of one creditor was purchased by another whose own debt was insufficient to found bankruptcy proceedings, in order to present a petition against such debtor for the *bond fide* purpose of having the debtor's property taken care of and the assets distributed amongst the creditors.

Held: That the petition was not an abuse of the process of the Court; and that a receiving order was rightly made.

THIS was an appeal on behalf of the debtor, *J. Baker*, from a receiving order made against him in the Barnstaple County Court.

The debtor, *Baker*, was a member of a certain Death Club, held at Bratton Fleming, in Devonshire, and also acted as assistant secretary of the said club, the secretary being a *Mrs. Hunt*; and the duties of the debtor and *Mrs. Hunt*, were to receive and keep accounts of moneys collected from time to time, and to pay certain claims which accrued due to persons under the rules of the club.

In December, 1886, the yearly account was carried in by *Baker* for *Mrs. Hunt*, which showed the payment of various claims, but on production of receipts being required, it appeared that in six cases appearing on the account, amounting in all to 600*l.*, the money had not been paid, and ultimately the debtor, *Baker*, undertook to make good these sums, in pursuance of which he gave to one *Hunt* (who was in no way related to the secretary of the club), and to one *Marsh*, being two out of the six claims above mentioned,

BANKRUPTCY REPORTS.

1887.
IN RE
BAKER,
EX PARTE
BAKER.

the sum of 50*l.* each, and a bill of exchange accepted by him for 45*l.* each.

In June, 1887, a committee meeting of the club was held, when a deficiency was discovered in the cash-box, to the extent of about 119*l.*, and the debtor, *Baker*, subsequently also assumed the responsibility for this, and promised that matters should be settled within a month. He did not attend, however, a meeting held on July 4th, 1887, when it was discovered that a further sum, also of 119*l.*, was wanting, and a letter was immediately written to him in respect thereof, in reply to which he signified his willingness to make good all deficiencies if time were given him, but on the same day he left his home, and went, as was alleged, to Cardiff.

On July 12th, 1887, *Hunt*, acting in accordance with a resolution of the club committee, bought from *Marsh* his bill of 45*l.* for the sum of 15*l.*, for the purpose of presenting a bankruptcy petition against *Baker*, which he did on July 15th, the act of bankruptcy alleged being that the said debtor, with intent to defeat or delay his creditors, departed from his dwelling-house or otherwise absented himself, within the meaning of section 4, sub-section 1 (d), of the Bankruptcy Act, 1883.

On July 21st, 1887, the debtor, having heard that a warrant had been issued against him, returned to Barnstaple, and a receiving order on the petition of *Hunt*, was subsequently made in the County Court.

From that order the debtor now appealed on two grounds:—(1), that no act of bankruptcy had been committed; and (2), that the petitioning creditor's debt having been bought for the purpose of presenting the petition, such petition was an abuse of the process of the Court.

F. C. Willis, Q.C. (Herbert Reed with him): for the debtor, *Baker*.

With regard to the first point, there were no creditors to defeat. Apart from the alleged claim of this club, the debtor owed practically no debts, and was not pressed at all. As for the club itself, I submit it was really a society which gambled on the death of the members, and was unlawful. It was the custom to accept nominees, although the person had no insurable interest, and the right to receive money on death was freely trafficked in. The whole diffi-

culty in which *Baker* found himself, was caused by the fact, that not being able to get in from all the members the moneys due from them, in order that no delay might occur to persons whose rights had accrued due, he advanced his own money to pay them, and trusted to recoup himself when he got money in by subsequent collections. When the discrepancies in the accounts were discovered, he simply undertook to make them good and be paid back. There is no evidence whatever that the debtor was liable for any of the money, or that any of it ever came into his pocket. On July 4th, 1887, he did not attend the meeting, because he was really ill, and he left his house simply on a visit to his friends. He went to see his brother first at Cardiff, and was away in all a fortnight. On this point, the registrar appears to have been unduly influenced by two circumstances—an old envelope found on the debtor with the address of a friend in America, and a letter in the debtor's handwriting, commencing, "Dear son and daughter, I regret to tell you that I was unable to catch the boat this afternoon." The registrar seems to have concluded that the man meant to go to America, but all that rests on a very vivid imagination. Then as to the other point. No sooner is *Baker* away from home, than *Hunt*, with the avowed sanction of a resolution of the committee, goes to *Marsh* and buys his bill, for the purpose of presenting a petition. Assuming that the bills were for good and valuable consideration, what was done was an abuse of the process of the Court. If a man buys a debt with the object of making a man a bankrupt, the Court will not uphold it. Two persons may petition, but if one will not join, the other may not buy the debt for the purpose. In the case of *Ex parte Griffin*, *In re Adams* (L. R. 12 Ch. Div. 480; 48 L. J. Bank. 107; 41 L. T. 515; 20 W. R. 208), it was held that "When the Court sees that a bankruptcy petition is presented, not with the *bona fide* view of obtaining an adjudication, but for a collateral purpose, and with the view of putting pressure on the debtor, it will refuse to make an adjudication, even though there be a good petitioning creditor's debt, and an act of bankruptcy has been committed." And Lord Justice Cotton said:—"I agree that the appeal must be dismissed. The proceedings in bankruptcy were not taken to obtain payment of the debt, but the debt was purchased in order to take the proceedings

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in bankruptcy." If a person has an interest in the debt, he must be a party in the petition, and there is no evidence here whatever that *Marsh* would come as a petitioning creditor. So in the case of *Ex parte Harper, In re Pooley*, (L. R. 20 Ch. Div. 685; 51 L. J. Ch. 810; 47 L. T. 177; 30 W. R. 650), it was held that "It is an abuse of the bankruptcy law to purchase a debt due by a bankrupt in order to procure the appointment of a trustee favourable to the bankrupt, or to a creditor, or a particular class of creditors, or to purchase a debt for the purpose of making the debtor (*e.g.*, the trustee in a bankruptcy) a bankrupt, with a view, not of recovering the debt, but of putting pressure upon him for a collateral object, or of injuring him in some way." Here the debt was bought up after the alleged act of bankruptcy for the purpose of making *Baker* a bankrupt, in order to punish him in relation to the affairs of the club. So in *Ex parte Gratton* (2 M. D. & De G. 401): *Seemle*, "Where proceedings are taken by the petitioning creditor, not for the purpose of obtaining payment of his own debt, but to compel the bankrupt to satisfy the alleged debt of a third person, the fiat cannot be supported." The legislature allows a creditor to get another creditor to join him in a petition, but nowhere says he may go and buy the other debt.

Thorne: for the petitioning creditor, was not called upon.

CAVE, J.:

Judgment.

This is an appeal against a receiving order made in the Barnstaple County Court, and two questions have been raised: (1) It is said that no act of bankruptcy has been committed; and (2) that this petition is an abuse of the process of the Court. Now as to the first point, the act of bankruptcy alleged was, that the debtor, with intent to defeat or delay his creditors, departed from his dwelling-house or otherwise absented himself; and I must say that, in my opinion, looking at the judgment of the County Court Registrar, he gave all possible weight—more than I myself should have felt inclined to give—to the statements of the debtor. It appears that Baker had in connection with Mrs. Hunt been assistant secretary of this club, and the duties of Mrs. Hunt and Baker were to receive amounts collected from time to time, and to pay the claims, or rights as they

were called, which had accrued due, and they were bound to hand over other moneys to the treasurer. Now, in December, 1886, Baker handed in the yearly account, and in that account he alleged that he had paid several claims. There is no statement before us of the moneys he had actually received. Baker in his accounts showed sums which had become payable, and his allegation was that these sums were actually paid. But when the receipts were asked for it appeared that six cases at any rate, amounting to about 600*l.*, had not been paid, and Baker is asked to account for this. He gives some excuse that he had advanced the money for members who had not paid, and that, in my opinion, he had not done. Ultimately he took upon himself the payment of these sums of money, and he gave to the petitioning creditor Hunt 50*l.* and a bill for 45*l.*, and the same to Marsh, another person who had one of these rights. What happened as to the other claims we are not told. That being so, and when the committee meeting is held in June a deficiency is discovered in the cash-box. It is said that the money was kept by Mrs. Hunt in a safe, and that she frequently went out and left the house open, and the suggestion is made that anybody could take it. Now that I do not believe, but what is beyond question is, that from the sum collected between January and June 119*l.* had disappeared. Mrs. Hunt is clearly in her evidence trying to shelter Baker, but Baker assumed the responsibility, and in fact he was told that he must do so. It seems to me a very plain case. If anybody can believe on the evidence that Baker did not take that money, all I can say is that I myself cannot believe it. When July 4th came, although Baker had said he would put the matter straight, he does not go near. At the meeting it is discovered that another sum of 119*l.* is wanting, and thereupon a letter is written and given to Mrs. Hunt, and she gave it to Baker, and he wrote promising to pay all that was due if it would be taken by instalments. To me it seems impossible to say that Baker had not had the money. But what does he do? He leaves his house. He does not go to the meeting of July 4th, when he has promised matters should be put straight, and after the second 119*l.* is found wanting he departs from his house. No one knows where he is. He is passing, we hear, under a false name at Weston. I must say that in my opinion Baker left his house

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to avoid the necessity of paying the money ; and he meant to defeat the creditors, the members of this club. The registrar had the parties before him and the witnesses, and I think we should be very wrong, holding the opinion which I do on the evidence before us, if we held that his decision on this point was not right. Now as to the second point. The debtor has disappeared no one knows where, and thereupon it is desired to take steps to obtain repayment of these moneys. Hunt, who is a creditor for 45*l.*, desires to take proceedings in bankruptcy, but he has not a sufficient debt, and he goes to Marsh and buys that debt for 15*l.* It is said that that is an abuse of the process of the Court, and we have been referred to three cases. Now it was first said that to buy a debt under any circumstances in order to found a bankruptcy petition on it is an abuse of the process of the Court. But there appears to be no case where that is said—where the mere buying of a debt in order to found a petition is an abuse. What has been said in *Ex parte Griffin, In re Adams* (48 L. R. 12 Ch. Div. 480 ; 48 L. J. Bank. 107 ; 41 L. T. 515 ; 20 W. R. 208), is that when the Court sees that a bankruptcy petition is presented, not with the *bonâ fide* view of obtaining an adjudication, but for a collateral purpose, and with the view of putting pressure on the debtor, it will refuse to make an order, even though there be a good petitioning creditor's debt, and an act of bankruptcy has been committed. But there the registrar came to the conclusion that the debt was acquired by Griffin simply and solely to enable him to enforce his personal purposes against the debtor by means of the intimidation of the Bankruptcy Court ; the double purpose being to stifle proceedings to strike one Moojen off the Rolls, and to stifle the claim of the debtor upon certain property known as "The Cedars ;" and the registrar held—as was afterwards held by the Court of Appeal—that he was bound to dismiss the petition "as being wholly outside the legitimate purposes of bankruptcy, as based upon proceedings altogether illegal, inequitable, vexatious, and oppressive." It is obvious that that case differs totally from this. The object was not to wind up the affairs of the debtor in bankruptcy at all. Then in the case of *Ex parte Harper, In re Pooley* (L. R., 20 Ch. Div. 685 ; 51 L. J. Ch. 810 ; 47 L. T. 177 ; 30 W. R. 650), it was desired to put pressure on Pooley in order to get him to fall in with the views of

the creditors in the other bankruptcy of which he was trustee, and for that purpose the petition was presented against him. Undoubtedly the late Master of the Rolls, in his judgment in that case, did say, "I must take it then that Mr. Harper knew that the object of buying up the debt was not the recovery of the debt, but to make the debtor a bankrupt, and (as I consider to be the fair inference) with the view of removing him from being trustee. But if it goes no further than the first proposition it is a gross abuse of the Bankruptcy law." And I quite agree with him to this extent. There is no right for a person having no interest to go and buy up a debt for the purpose of making a man a bankrupt. I agree that if a person does so there must be some indirect motive, because, if not, why should he buy the debt? He must have some object in his mind which is not *bonâ fide*. I agree that if I found a man with no interest buying a debt, I should think he had some indirect motive. Then the case of *Ex parte Gratton* (2 M. D. & De G. 401), was cited for the *Semle*. It is not necessary to discuss how that is to be understood. In one sense I quite agree with it, but if it is intended to apply where the man takes proceedings for the purpose of getting all the debts paid out of the property of the bankrupt that is not supported by the case. In the last paragraph of his judgment, Sir John Cross says ". . . The fiat was sued out by the petitioning creditor not for the purpose of obtaining payment of his own debt, but for another and wholly illegitimate purpose." If the bankruptcy law is put in force for an illegitimate purpose it is undoubtedly an abuse. But here Hunt was no stranger to the affairs. He was himself a creditor for 45*l.*, and he had considerable interest in the affairs of this club. He had bought up rights and was interested as a subscriber. It was practically admitted by Baker that he was liable for 240*l.* of the money of the club, and there was good ground for fearing that that liability was much more. Hunt had a direct interest in having the property of the bankrupt preserved and administered by the Court of Bankruptcy. His difficulty was that his debt was only 45*l.*; and he got over that by purchasing Marsh's debt. Was that done *malâ fide*? Was it done to compel the debtor to pay other than in the course of bankruptcy the debt of the club? Had he any collateral object? I cannot see any. The man had admitted

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240*l.* debt and he had disappeared no one knew where. What would any one naturally do who had any interest in the affairs of the debtor? He would get a receiving order made and have the property taken care of. It is absurd to say that he was putting pressure on the bankrupt. You cannot put pressure on a man who has gone away. The only object was to have the property taken care of. Under the circumstances I decline to carry the cases a single step further than they appear to me to have gone, and in my opinion the proceedings of Hunt were not an abuse of the process of the Court, and the receiving order was rightly made.

A. L. SMITH, J. :

I am of the same opinion. There is clear and ample evidence that the debt was due from Baker to the Society. In my opinion there is also ample evidence that Baker was absent with intent to defeat and delay. Now we come to the question whether bankruptcy proceedings can be founded on a debt bought to found them. It is proved that Hunt bought this bill for 15*l.*, to take bankruptcy proceedings, and Mr. Willis argued that even if it had been bought up honestly it was an abuse. Now let us examine the cases. In *Ex parte Gratton* (2 M. D. & De G. 401), the fiat was sued out "for a wholly illegitimate purpose." In *Ex parte King, In re Davies* (L. R. 3 Ch. Div. 461; 45 L. J. Bank. 159; 25 W. R. 239) Lord Justice JAMES, with regard to that case said, "To my mind it is quite shocking that proceedings in bankruptcy should be used as a means of extorting money from a debtor." That is clearly an abuse. Then in *Ex parte Griffin, In re Adams* (L. R. 12 Ch. Div. 480; 48 L. J. Bank. 107; 41 L. T. 515; 20 W. R. 208), the proceedings were taken not to distribute the debtor's property, but to force him to give up a just debt which was due to him, and Lord Justice COTTON, who is a most accurate judge, said, "The proceedings in bankruptcy were not taken to obtain payment of the debt, but the debt was purchased in order to take the proceedings in bankruptcy." The words are "*the proceedings in bankruptcy.*" It does not say what Mr. Willis argued, that if the proceedings had been otherwise than oppressive it would be an abuse. Then in *Ex parte Harper, In re*

Pooley (L. R. 20 Ch. Div. 685 ; 51 L. J. Ch. 810 ; 47 L. T. 177 ; 30 W. R. 650), Lord Justice HOLKER said, " It appears to me very clear that it is a gross abuse of the bankruptcy laws for persons to buy debts which are due by other people for no other purpose than that of enabling them to carry the choice of a trustee in bankruptcy, or to place anybody in a position of control with reference to the bankrupt's affairs." In the present case all the elements of illegitimacy are wanting. The debt was bought for the legitimate purpose of distributing the assets, and, in my opinion, what was done was not an abuse.

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Appeal dismissed with costs.

Solicitors :—*Clarke, Woodcock & Ryland*, for the debtor Baker.
Church & Co., for the petitioning creditor.

Cases relied upon and referred to :—

Ex parte Griffin, In re Adams, L. R. 12 Ch. Div. 480 ; 48 L. J. Bank. 107 ; 41 L. T. 515 ; 20 W. R. 208.

Ex parte Harper, In re Pooley, L. R. 20 Ch. Div. 685 ; 51 L. J. Ch. 810 ; 47 L. T. 177 ; 30 W. R. 650.

Ex parte Gratton, 2 M. D. & De G. 401.

In re Davies, Ex parte King, L. R. 3 Ch. Div. 461 ; 45 L. J. Bank. 159 ; 25 W. R. 239.



PRACTICE.

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COURT.BEFORE
CAVE, J.AND
A. L. SMITH, J.
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IN RE COCK, EX PARTE SHILSON.

*Bankruptcy Act, 1883, section 55.**Disclaimer of Lease—Mortgage by subdemise—Vesting order—Application by
Landlord—Form of order.*

Leave having been given to the trustee in a bankruptcy to disclaim the bankrupt's interest in certain leases, it was at the same time ordered, on the application of the landlord, that unless the executor of a mortgagee by subdemise of the bankrupt's interest should, within seven days, elect to accept an order vesting in him the disclaimed property, subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property.

Held: That the Court had power to make the order on the application of the landlord; and that, subject to a formal amendment making it clear that a vesting order might be taken as to all or none or any one or two of the leases, the order made was right.

The case of *In re Parker & Parker, Ex parte Turquand* (see *ante*, Vol. I. p. 275; L. R. 14 Q. B. D. 405; 51 L. T. 667; 33 W. R. 752) commented on.

THIS was an appeal from an order of the Judge of the County Court at Truro, by which, on giving leave to the trustee in the bankruptcy to disclaim the bankrupt's interest in certain leases, he directed, on the application of the landlord, that unless the present appellant, *Shilson*, who was executor of one *Charles Henry Nankivell*, a mortgagee by sub-demise of the bankrupt's interest, should, within seven days, elect to accept an order vesting in him the disclaimed property, subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property.

On August 20th, 1883, the Earl of Mount Edgcumbe granted to the debtor, *David Cock*, three leases for several terms of 99 years, at rents from eight to ten guineas, and heriots from four to five guineas, and burdened with onerous covenants as to rent, repairs, and building certain houses and walls, &c.

On March 21st, 1885, the debtor mortgaged to *C. H. Nankivell* these three properties by way of demise, reserving to himself the last three days of the term.

In 1886, *C. H. Nankivell* died, and Mr. *Shilson*, the present appellant, became his executor.

In 1887, *David Cock* became bankrupt, and the trustee in the bankruptcy subsequently applied to the Truro County Court for leave to disclaim these three leases amongst other property.

Leave was given to the trustee to disclaim, and on the application of the solicitor for the Earl of Mount Edgecumbe, it was further ordered, that the present appellant should take a vesting order, subject to the same liabilities and obligations as the bankrupt, or should be excluded from all interest in and security upon the property as above set out.

From this part of the order Mr. *Shilson* now appealed.

Herbert Reed : for Mr. *Shilson*.

What I complain of first is, that, as the order is made, I cannot take a vesting order of one lease, but must take a vesting order of all or none. The leases were separate and independent, and I want, at any rate, my rights preserved, that I may elect to take or refuse a vesting order as to all or any as I may see fit. But I go further, and I say that no such order as this could be made. In any event, such an order could not be made on the application of the landlord. In *Ex parte Turquand, In re Parker* (see *ante*, Vol. I., p. 275 ; L. R. 14 Q. B. D. 405 ; 51 L. T. 667 ; 33 W. R. 752), it was held, that on a disclaimer of leaseholds by a trustee in bankruptcy, the landlord has not such an interest in the disclaimed property as to be entitled to a vesting order. Section 55 of the Bankruptcy Act, 1883, provides by sub-section (1) that a trustee in bankruptcy may disclaim onerous property, and by sub-section (2) the disclaimer shall operate to determine the rights and liabilities of the bankrupt, and to discharge the trustee from liability in respect of the property disclaimed, but shall not "affect the rights or liabilities of any other person." Then, by sub-section (6), "The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed

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property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose. Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt." All that is intended is to confer a benefit on some person interested in the property, and liable to the covenants notwithstanding the disclaimer. The intention was to give the property to the person under liability, and to give it only on his application. The Court has no power to make such an order except on the application of the sub-lessee. The words of the proviso to sub-section (6) are "in favour of" any person they are not "against," and it would be very startling if, although a sub-lessee or mortgagee never applied, the Court *mero motu*, or on application of a person not interested and not under liability, could make an order of exclusion against him. Then, at all events, the order could not be made on the application of the landlord. There is no power to apply to exclude without a power to vest. The landlord cannot apply to vest in him, and he cannot apply to

exclude. (Counsel also referred to *Smalley v. Hardinge*, L. R. 7 Q. B. D. 524; 50 L. J. Q. B. 367; 44 L. T. 503; 29 W. R. 554; *Ex parte Walton, In re Levy*, L. R. 17 Ch. Div. 746; 50 L. J. Ch. 657; 45 L. T. 1; 30 W. R. 395.)

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Sidney Woolf: for the landlord.

As to the first point, the form of order is the usual one, but there is really nothing to prevent the appellant from taking a vesting order as to one or any of the leases if he thinks fit. As to the other point, the question is really a very simple one. The proviso in sub-section (6) of section 55, was framed to remedy the hardship pointed out in *Smalley v. Hardinge* (L. R. 7 Q. B. D. 524; 50 L. J. Q. B. 367; 44 L. T. 503; 29 W. R. 554), and similar cases. That has been done, and done effectually. Then the case of *Ex parte Turquand, In re Parker* (see *ante*, Volume I., p. 275; L. R. 14 Q. B. D. 405; 51 L. T. 667; 33 W. R. 752), seems to say that a landlord is not entitled to have a vesting order, but it does not say that he cannot make application for one, and that case is a distinct authority that persons like the appellant must take a vesting order or be excluded. The landlord, under sub-section (6), may apply to have a vesting order to the mortgagee, and the mortgagee has the option to take it or not. The person who may make the application, and the person having the vesting order made on him, are quite distinct.

December 21st.

CAVE, J., delivered the judgment of the Court :—

This is an appeal from an order of the County Court of Cornwall, Judgment giving the trustee leave to disclaim the bankrupt's interest in certain leases, and on the application of the landlord, ordering that, unless the appellant as executor of Charles Henry Nankivell, a mortgagee by sub-demise of the bankrupt's interest, should, within seven days, elect to accept an order vesting in him the disclaimed property, subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in, and security upon the property.

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The first point taken for the appellant, was, that as the leases from the landlord to the bankrupt were separate and independent, he ought to be permitted to make his election, to take or refuse a vesting order as to all or any, as he may see fit. This point, which does not appear to have been brought before the judge of the County Court, was at once admitted by Mr. Woolf, who appeared for the respondent; and, if necessary, the order may be amended accordingly.

It was next contended that the Court had no power to make such an order, except on the application of the sub-lessee, or, at all events, not on the application of the landlord. On this point, we took time to put our judgment into writing, not on account of any doubt we felt on the point, but because on a subject which is so likely to recur, we thought it advisable to lay down a distinct principle in writing, for the guidance of the Court in future.

By section 23 of the Act of 1869, the trustee was entitled to disclaim, among other onerous property, any lease burdened with onerous covenants; and it was provided that on the execution of such disclaimer, the property disclaimed should, if the same was a lease, be deemed to have been surrendered on the date of the order of adjudication. It was further enacted that any person interested in any disclaimed property, might apply to the Court, and the Court might upon such application, order possession of the disclaimed property to be delivered up to him.

This section soon gave rise to questions of some difficulty. In *Smalley v. Hardinge* (L. R. 7 Q. B. D. 524), it was held by the Court of Appeal that when a lessee sublets and afterwards becomes bankrupt and his trustee disclaims, the lessor is not entitled to eject the sub-tenant. In the judgment in that case, some expressions are to be found, treating the disclaimer as having the same effect as an actual surrender. When, however, that question subsequently came before the Court of Appeal in *Ex parte Walton, In re Levy* (L. R. 17 Ch. D. 746), the Court held that the words of the section must be read with some qualification, and that the disclaimer operated as a surrender so far only as was necessary to relieve the bankrupt and his estate and the trustee from liability, and did not otherwise affect the rights or liabilities of third parties in relation to the property disclaimed.

The construction of this statute came before the House of Lords in *Hill v. East and West India Dock Co.* (L. R. 9 App. Cas. 448), and the opinions of their lordships, and especially that of Lord BRAMWELL in that case, may be referred to as showing the difficulty felt in putting a construction on the language of section 23 of the Act of 1869.

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That section, however, has been repealed, and the statute of 1883 has, as Lord CAIRNS said, substituted an enactment of a very different and much more explicit kind upon this part of the bankruptcy law. Sub-section (1) of section 55 enacts, in general terms, that the trustee may disclaim onerous property of various kinds, including land of any tenure burdened with onerous covenants. Sub-section (2) provides that the disclaimer shall operate to determine as from the date of disclaimer the rights, interests and liabilities of the bankrupt, and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other persons. Now there is no doubt that, if the section had stopped there, it would have been in substance a re-enactment of the corresponding part of the Statute of 1869, as explained by the cases already cited.

By sub-section (6) the Court may, on application by any person either claiming any interest in any disclaimed property or under any liability not discharged by the Act in respect of any disclaimed property, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid on such terms as the Court thinks just. This sub-section appears intended to apply to all property that may be disclaimed, of whatever kind. In *Ex parte Turquand* (see *ante*, Vol. 1, p. 275, L. R. 14 Q. B. D. 405), I expressed a doubt whether the words "person claiming an interest in any disclaimed property" include a landlord. They do of course include persons claiming under the bankrupt; but on further consideration we think that they include the lessor also. For instance, if a lessee in possession

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who had neither given nor contracted to give any interest to any one else were to become bankrupt, and his trustee were to disclaim, we think the Court would have authority under this section to give possession to the landlord on his application. This view, however, would not dispose of the present case; for there being a sub-lessee, the landlord could not under the section, so far as we have yet gone, shew that he was entitled to the disclaimed property. We do not, as at present advised, think that the landlord could apply under this part of the section for an order that the property should be vested in or delivered to a person other than himself, except in cases where such other person is only a trustee for the landlord. The sub-section, however, provides that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease when the petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order in such terms the Court shall have power to vest the bankrupt's estate in the property in any person liable alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt. Now we are clearly of opinion that this provision is of general application in all cases in which an application to disclaim is made, and not only to cases where the sub-lessee or mortgagee by demise applies for a vesting order. This is clearly the opinion of Lord BRAMWELL, who, in *Hill v. East and West India Dock Co.* (L. R. 9 App. Cas. 448), speaking of this proviso to sub-section (6), says "It is noticeable that it gives a great benefit to landlords, doubtless from a sense of their use to the public. Why should a sub-lessee or mortgagee bear the loss occasioned by a lessee's bankruptcy? Why not the landlord?" To this it may be replied that the benefit is given equally to the lessee where the bankrupt is an assignee, and to the surety where there is one for a bankrupt lessee.

Let us see how the case will work out in practice. A. grants a lease for 99 years at 100*l.* a year to B., who assigns to C., who in consideration of an advance of 2000*l.* demises to D. for the residue of the term except three days, at a peppercorn. C. becomes bankrupt, and his trustee, wishing to disclaim, brings A., B., and D. before the Court. A. cannot apply for a vesting order or a delivery order because he is not entitled to the property, nor can B. so long as D. is willing to take a vesting order. B. therefore applies that D. may be put to his election, and if he declines to take a vesting order that he may be excluded, and a vesting order made in favour of him B. The same thing occurs where C. is the lessee and B. is only a surety for him. Where there is no person liable, either jointly with the bankrupt or alone, to perform the lessee's covenants, we are of opinion that, notwithstanding the doubt expressed in *Ex parte Turquand* (see *ante*, Vol. I., p. 275; L. R. 14 Q. B. D. 405), the landlord may apply that the sub-lessee may be put to his election. If he elects to take a vesting order he gets one. If he declines, the landlord may ask for an order excluding the sub-lessee from all interest in and security upon the property, and vesting the property in him the landlord discharged from the sub-lease because, by virtue of the disclaimer and the exclusion of the sub-lessee, he has become the party entitled to possession. This course appears to us to be clearly warranted by the language of the Act, and to carry out its provisions. Until the sub-lessee has declined to take a vesting order, the Court has no power to make a vesting order either in favour of the original lessee or of the surety for the bankrupt, if there is one; and, consequently, if the power could only be exercised upon an application by the sub-lessee, it would remain a dead letter, for the sub-lessee never would have any interest in making such an application, and the person liable jointly with the bankrupt or alone could not get a vesting order until the sub-lessee had declined. Where all the parties are before the Court upon an application for leave to disclaim, the vesting order may at once be offered to the sub-lessee, and, on his refusal, may be granted to the surety or original lessee, or, if there is no person liable alone or jointly with the bankrupt, an order for a vesting order and for delivery of possession, or for a vesting order only, as the circumstances may require, may be made in favour of the lessor.

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Where no leave to disclaim is required, and consequently the parties interested in the property disclaimed or liable to perform the covenants of the lease are not brought before the Court by the trustee, we are of opinion that the person liable to perform the covenants, or, in the absence of such person, the lessor may bring the sub-lessee before the Court and ask for an order for his exclusion, and for a vesting order, or for delivery of the property if the sub-lessee refuses himself to take a vesting order.

For these reasons, we are of opinion that the order of the Court below was substantially right; and subject to a formal amendment making it clear that the appellant is entitled to take all or none or any one or two of the leases, the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Coode, Kingdon & Cotton*, for Mr. Shilson.
Bell, Brodrick & Gray, for the landlord.

Cases relied upon and referred to:—

Ex parte Turquand, In re Parker, see *ante*, Vol. I., p. 275;
 L. R. 14 Q. B. D. 405; 51 L. T. 667; 33 W. R. 752.

Smalley v. Hardinge, L. R. 7 Q. B. D. 524; 50 L. J. Q. B. 367; 44 L. T. 503; 29 W. R. 554.

Ex parte Walton, In re Levy, L. R. 17 Ch. Div. 746; 50 L. J. Ch. 657; 45 L. T. 1; 30 W. R. 395.

Hill v. East and West India Dock Co., L. R. 9 App. Cas. 448; 53 L. J. Ch. 842; 51 L. T. 163; 32 W. R. 925.

PRACTICE.

IN RE RANKIN, Ex PARTE RANKIN.

DIVISIONAL
COURT.BEFORE
CAVE, J.

AND

A. L. SMITH, J.
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and 8th.*Bankruptcy Act, 1883, section 28.**Discharge—Rash and hazardous speculations—Absolute refusal of discharge—*
Appeal—Suspension for three years.

On application by a bankrupt for his discharge the official receiver reported that such bankrupt had brought himself within the provisions of section 28, sub-section (3) of the Bankruptcy Act, 1883, in that he had been guilty of rash and hazardous speculations by reason of certain gambling transactions in connection with the Stock Exchange.

The County Court Judge refused to grant any order of discharge whatever.

Held (on appeal): That under the circumstances, and taking into consideration the facts that the bankrupt was not a trader and that only one of the offences specified in section 28, sub-section (3) had been reported against him, the proper order would be to suspend the order of discharge for a period of three years.

THIS was an appeal from an order of the Judge of the County Court at Croydon refusing to the bankrupt any order of discharge.

A preliminary objection was taken that the case was a Small Bankruptcy under section 121 of the Bankruptcy Act, 1883, and that no leave to appeal had been obtained. This portion of the case was reported *ante*, Vol. IV., page 811, and the Court held that "Rule 273 (6) of the Bankruptcy Rules, 1886—which provides that in a Small Bankruptcy no appeal shall lie from any order of the Court, except by leave of the Court—does not apply to the case of an order made upon application by a bankrupt for his discharge."

The case was then heard upon the merits:—

The debtor *Rankin* was of no occupation, and the evidence showed that he had brought on his bankruptcy by gambling transactions with outside brokers in connection with the Stock Exchange.

The official receiver stated in his report that the bankrupt had brought himself within the provisions of section 28, sub-section

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(3), of the Bankruptcy Act, 1883, in that he had been guilty of rash and hazardous speculations, and he suggested that the discharge ought to be suspended for four years.

The County Court Judge, however, refused to grant any order of discharge at all, and from that decision the debtor now appealed.

Horne Payne, Q.C. (McIntyre with him) : for the bankrupt.

What the County Court Judge did was gross injustice to the bankrupt. The official receiver said that a suspension for four years was sufficient. The bankrupt had really only three creditors, and they were outside brokers. The debtor fell into the hands of these outside brokers, who induced him to come in and gamble. They then got bills and sued on them. The debtor lost all he possessed.

[CAVE, J. : The question is rather whether the debtor's conduct is such that he should be allowed to commence free again. The conduct of the creditors is not of so much consequence. The worse those persons who took him in were, the more foolish he was, and the more unfit he is to trade with other persons.]

The conduct of the debtor at any rate does not deserve the highest punishment. The County Court Judge refused the discharge absolutely.

[CAVE, J. : That seems the great strength of your case. If the discharge is suspended absolutely in a case like this, what is to be done in a case where the conduct of a bankrupt is much worse ?]

Here at most the bankrupt has been guilty only of rash and hazardous speculation, and I ask your Lordships to mitigate the punishment.

Muir Mackenzie : for the Official Receiver.

I submit that this is no case for varying the order of the County Court.

[A. L. SMITH, J. : If you give a man penal servitude for life the first time for stealing a pocket-handkerchief, what are you to do in a worse case ?]

Under the Bankruptcy Act, 1849, section 201, a bankrupt who had been guilty of this offence would have been refused his certificate altogether. The legislature in the Act of 1883 has left it within the discretion of the Court, and has not drawn a hard and fast line; but that is the only difference. It is not an improper exercise of discretion, in a bad case of gambling, to follow the Act of 1849 and suspend the discharge altogether. Here the assets were 15*l.*, and the debts were over 2,000*l.*

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CAVE, J.:

This is an appeal against an order of the County Court Judge Judgment. refusing altogether to give the bankrupt his order of discharge. Undoubtedly orders of this kind are founded on discretion; and when it is a question merely of a little more or a little less, the Court ought not to interfere. Also when it is a question of fact and the County Court Judge has taken a right view of the facts, the Court would not be very ready to interfere with his decision. Here there is no dispute as to the facts. The bankrupt was not a trader. He was of mature years. He embarked in this undoubtedly rash and hazardous speculation with the result which might be foreseen—he lost all his money. There is no doubt whatever that the bankrupt was guilty of rash and hazardous speculations, and that is one of the matters in section 28, sub-section (3), on proof of which the Court is at liberty to refuse the discharge or suspend it, or grant a discharge subject to conditions. I am myself inclined to take a very strict view of rash and hazardous speculations. I think that this gambling ought to be put down; and I am especially inclined to take a strict view when this gambling is gambling by a trader. It then is a very serious offence, and when the result is that the trade creditors are left unpaid, if a County Court Judge suspended the discharge altogether, I should certainly not interfere with him. Here the bankrupt is not a trader. He was risking his own money, and the worst thing alleged against him is that, having entered into a peculiar marriage settlement by which he covenanted to pay 2,000*l.*, he did not pay the 2,000*l.*, but he speculated and lost all his money, and could not pay. But that is not so bad as speculating with other people's money, as a trader does if he speculates. Then again the consequence of refusing a discharge absolutely upon

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one offence is, What are you to do with a man who is guilty of three or four offences? The moment you give so excessive a sentence for one offence like this, you put it out of your power to give a heavier penalty in cases where the conduct has been very much worse. Then, besides the effect on the debtor, there is also to be considered the advantage to be gained by the creditors. If the bankrupt were a trader, I should not interfere with anything which might give the creditors a chance of eventually being paid. But the case is very different where the creditors are persons engaged in the transactions which have brought on the bankruptcy. In the present case I rather regret that our suspending the certificate—which we must do—may give these creditors the chance of being paid which I should be glad to deprive them of. But I think, under all the circumstances, the proper order will be to suspend the order of discharge for three years.

A. L. SMITH, J. :

I am of the same opinion. The discretion to be exercised in a case of this kind, is a judicial discretion, which has not been exercised here, or if it was exercised, it was exercised wrongly. In my opinion, a proper order will be to suspend the discharge for three years from the present time.

Order accordingly.

Solicitors :—*Morley & Sherriff*, for the bankrupt.

The Solicitor to the Board of Trade, for the Official Receiver.

PRACTICE.

IN RE VANDERHAAGE, EX PARTE IZARD.

*Bankruptcy Act, 1883, section 37 and Schedule II.**Bankruptcy Rules, 1886, Rules 131, 148.**Proof—Rejection by Trustee—Appeal—Creditor resident abroad—Security for costs of appeal.*BEFORE
MR. JUSTICE
CAVE.

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and 20th.

Held : That where the proof of a creditor residing abroad is rejected by the trustee in a bankruptcy, and from such rejection the creditor appeals, the Court has no jurisdiction to order such creditor to give security for the costs of the appeal.

THIS was an application on behalf of the trustee in the bankruptcy, that a creditor who was appealing against the rejection of a proof, might be ordered to give security for costs.

The case raised the question whether the Court has jurisdiction to order a creditor, residing abroad, who is appealing from the rejection of his proof by the trustee, to give security for the costs of such appeal.

A proof for 12,000*l.* was tendered against the estate of the bankrupt *Vanderhaage*, by Madame *Viney*, a French lady, residing in Paris.

This proof was rejected by the trustee in the bankruptcy, and from that rejection Madame *Viney* appealed.

The trustee now applied to the Court for an order directing her to give security for the costs of the appeal.

F. C. Willis : for the trustee in the bankruptcy.

I ask for an order. The case is certainly one in which security ought to be given.

Herbert Reed : for the trustee.

Nothing can be found either in the Bankruptcy Act or in the Rules which gives the Court jurisdiction to make any such order as is asked for here. If we look at Rule 131 of the Bankruptcy Rules,

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1886, we find it deals only with appeals to the High Court. Then Rule 148 is only applicable to the case of a petitioning creditor resident abroad. A trustee cannot compel a foreign creditor to give security by simply rejecting his proof.

F. C. Willis :

It may be that there is no special enactment in the Bankruptcy Act or in the Rules, with regard to this question; but this Court is a branch of the High Court, and it is within the jurisdiction of the Court to order such security to be given if and when it thinks it proper and reasonable.

CAVE, J. :

Judgment.

I am of opinion that this application must be refused. Mr. Willis has not been able to produce any enactment or authority to show that security for costs can be ordered in such a case as this. By the Rules which have been referred to, those cases are indicated in which such security can be required. The *primâ facie* inference is raised, therefore, that it cannot be required or enforced in cases which are not so specified. In my opinion it would be oppressive to require a creditor residing abroad, who is prosecuting his claim to prove against a bankrupt's estate here in due course, to give security for the costs of an appeal against the rejection of his proof by the trustee. If that course were adopted, it would be a temptation to a trustee to reject a proof without investigation in order that he might get security for the costs of investigating it before the Court. The application of the trustee must be refused.

Application refused.

January 16th.

An appeal to the Court of Appeal was lodged against the above decision, but an arrangement having been come to between the parties by which the creditor agreed to deposit 20*l.* as security, the case was on this day mentioned to Mr. Justice CAVE, who assented to such arrangement.

January 20th.

On this day the appeal on behalf of the trustee was in the paper in the Court of Appeal, but on being called on, was by leave of the Court withdrawn.

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Solicitors : *Foster & Co.*, for the trustee in the bankruptcy.
Goldberg & Langdon, for Madame Viney.

PRACTICE.

IN RE LONG & CO., EX PARTE LONG & CO.

Bankruptcy Act, 1883, section 6.

Petition by Creditor—Amount of Debt—Costs of Abortive Execution added to Judgment Debt.

COURT OF
APPEAL.
BEFORE THE
MASTER OF
THE ROLLS,
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LOPES, L.J.
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Held: That the costs of issuing an abortive execution cannot be added to a judgment debt so as to make up the amount necessary to enable a creditor to present a bankruptcy petition against the debtor under section 6 of the Bankruptcy Act, 1883.

January 20th.

THIS was an appeal on behalf of the debtors Messrs. *Long & Co.* from a receiving order which had been made against them by the Registrar.

The case turned upon the question whether in estimating the amount of a petitioning creditor's debt the costs of issuing an abortive execution under a judgment might be included.

On November 5th, 1887, judgment was recovered by Messrs. *Cuddiford Brothers* against *Long & Co.*, for the sum of 49*l.* 8*s.*

A *fi. fa.* was issued on this judgment, but the execution proved abortive.

A bankruptcy petition was thereupon presented against the debtors, such petition stating that the said *Long & Co.* were indebted to the petitioning creditors in the aggregate in the sum of

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50*l.* 18*s.*—"being as to 49*l.* 8*s.*, the amount due on a final judgment obtained in the High Court on November 5th, 1887; and as to 1*l.* 5*s.*, balance thereof, the cost of issuing execution on the said judgment."

Upon this petition a receiving order was made by the Registrar, and from that order the debtors now appealed.

Channell, Q.C. (*Yelverton* with him) : for Messrs. Long & Co.

The question is simply whether the costs of an abortive execution on a judgment is a debt which can come in to make up a debt to 50*l.* for the purpose of making a man a bankrupt. Section 6 of the Bankruptcy Act, 1883, provides by sub-section (1):—"A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—(a) The debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds: and (b) The debt is a liquidated sum, payable either immediately or at some certain future time." Costs of an execution can only be obtained in one way—out of the proceeds of the execution which you levy. It is not a debt for which you can sue. The costs of an execution can only be obtained by issuing execution successfully. Order XLII., Rule 15, of the Rules of the Supreme Court, 1883, which provides that "In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered," is identical with section 123 of the Common Law Procedure Act, 1852, and in the case of *The Marquis of Salisbury v. Ray* (8 C. B. N. S. 193), it was held that, "The 123rd section of the Common Law Procedure Act, 1852, which gives the plaintiff in every case of execution a right to levy 'the expenses of the execution' over and above the sum recovered by the judgment, does not entitle him to take under a *ca. sa.* the expenses of a previous abortive writ of *fi. fa.*" No action has ever been brought for costs of execution. I say that costs of an execution are not a debt at all; or in any case they are only a contingent debt. The petitioning creditors could only get this 1*l.* 5*s.* by succeeding in their execution. Costs which you cannot sue for cannot form a petitioning creditor's debt. The Registrar simply said that it had

been the practice to include these costs. (Counsel also referred to *Howes v. Young*, L. R. 1 Ex. Div. 146 ; 45 L. J. Ex. 499 ; 34 L. T. 739 ; 24 W. R. 738. *Re Miller*, 11 W. R. 374.)

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Herbert Reed : for the petitioning creditors.

The case of *Bayley v. Potts* (8 A. & E. 272) seems to show that a debtor is under liability for these costs. There "Plaintiff having signed judgment for 23*l.* debt and costs, took out a *fi. fa.* for 24*l.*, the 1*l.* being claimed for costs of execution under statute 43 Geo. 3, c. 46, s. 5. An attempt was made to levy which failed, defendant having no goods. Defendant then tendered 23*l.*, which plaintiff refused and issued an *elegit* for the 24*l.* It was held that the tender was insufficient, the plaintiff being entitled under the statute to the costs claimed above 23*l.*, and the Court refused to set aside the *elegit*." That case answers the question that these costs could not be recovered in any way except by the levy under the particular writ. (Counsel also referred to *Ex parte Liverpool Loan Co., In re Bullen*, L. R. 7 Ch. App. 732 ; 42 L. J. Bank. 14 ; 27 L. T. 669 ; 20 W. R. 1028.)

THE MASTER OF THE ROLLS (LORD ESHER) :

It seems to me that the case of *The Marquis of Salisbury v. Ray* Judgment. (8 C. B. N. S. 193) is really decisive upon this case. It was there laid down that the costs of execution cannot be considered to be part of the judgment. If that be so there is nothing to make them a debt, and if they are not a debt they cannot be added to make up the 50*l.*, which is required to make a good petitioning creditor's debt under section 6, sub-section 1 (a) of the Bankruptcy Act, 1888. The appeal must therefore be allowed.

FRY, L.J. and LOPES, L.J. concurred.

Appeal allowed with costs.

Solicitors : *R. Davies*, for Messrs. Long & Co.

Gresham & Davies, for the petitioning creditors.

Cases relied upon and referred to :—

The Marquis of Salisbury v. Ray, 8 C. B. N. S. 193.

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Howes v. Young, L. R. 1 Ex. Div. 146 ; 45 L. J. Ex. 499 ;
 34 L. T. 739 ; 24 W. R. 738.

Re Miller, 11 W. R. 374.

Bayley v. Potts, 8 A. & E. 272.

Ex parte Liverpool Loan Co., In re Bullen, L. R. 7 Ch. App.
 732 ; 42 L. J. Bank. 14 ; 27 L. T. 669 ; 20 W. R. 1028.



COURT OF
 APPEAL

IN RE BURDETT, EX PARTE BYRNE.

BEFORE THE
 MASTER OF
 THE ROLLS,
 FRY, L.J.,
 LOPES, L.J.
 1888.

Jan. 20th and
 30th.

Bill of Sale—Assignment of property other than personal chattels—Avoidance in part—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), sections 4 and 5—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), sections 5 and 9.

Where a bill of sale not made in accordance with the statutory form purported to assign, together with personal chattels, certain trade machinery not personal chattels for the purposes of the Bills of Sale Acts.

Held: That the illegal part of the security could be severed from the legal ; and that, as regarded the machinery, the security was good.

The case of *Davies v. Rees* (L. R. 17 Q. B. D. 408 ; 55 L. J. Q. B. 363 ; 54 L. T. 813 ; 34 W. R. 573) distinguished.

THIS was an appeal from a decision of the Divisional Court in Bankruptcy declaring a bill of sale void.

On June 25th, 1886, the debtor *Burdett* executed to Messrs. *Byrne & Furze* a deed of security, by which in consideration of goods of the value of 50*l.* to be immediately delivered to *Burdett* by *Byrne & Furze*, and of 150*l.* due from *Burdett* to them for money lent, *Burdett* assigned to *Byrne & Furze* certain chattels described in the schedule as security for 200*l.* and interest ; and by the deed the borrower declared that he would pay the 200*l.* and interest by certain instalments.

It was admitted on the one hand that this document did not comply with the terms of the Bills of Sale Act, 1882.

On the other hand it was admitted that amongst the property described in the schedule there was certain trade machinery which

was within the exception in section 5 of the Bills of Sale Act, 1882, and therefore, not personal chattels for the purposes of that Act.

The deed being void under section 9 as a bill of sale so far as regarded the personal chattels, the question arose whether it was equally void as regarded the property which was not personal chattels.

The Divisional Court in Bankruptcy, affirming the decision of the Judge of the County Court at Greenwich, held that the said bill of sale was void to all intents and purposes.

From that decision the bill of sale holder now appealed.

Robson : for the bill of sale holder.

I contend that the deed is good as to the property not personal chattels although it is void as to the personal chattels. The bill of sale is good as a mortgage of the machinery. In *In re O'Dwyer* (L. R. 19 Ir. 19) it was held that, "When a bill of sale includes a mortgage of chattels real, a deviation from the statutory form invalidates the instrument so far only as regards the chattels personal comprised in it, and does not avoid it so far as it is a mortgage of chattels real." It is true that in *Davies v. Rees* (L. R. 17 Q. B. D. 408 ; 55 L. J. Q. B. 363 ; 54 L. T. 813 ; 34 W. R. 573) it was held that "Section 9 of the Bills of Sale Act, 1882, in avoiding a bill of sale which is not made in accordance with the form in the schedule to the Act avoids it in toto—not merely as regards the personal chattels comprised in it—so that a covenant contained in it for the payment by the grantee of the principal and interest thereby secured is rendered void as against him." But that case is distinguishable. There the question was whether a covenant for the payment of the money failed if the bill of sale was void. (Counsel also referred to *Roberts v. Roberts*, L. R. 13 Q. B. D. 794 : 53 L. J. Q. B. 313 : 50 L. T. 351 : 32 W. R. 605 : *Kerrison v. Cole*, 8 East, 231 : *Davenport v. Whitmore*, 2 Myl. & Cr. 177).

R. T. Reid, Q.C. (Herbert Reed with him) : for the trustee.

This case is practically decided by *Davies v. Rees* (L. R. 17 Q. B. D. 408 : 55 L. J. Q. B. 363 : 54 L. T. 813 : 34 W. R. 573), and the bill of sale is void under that case. There is one assignment of the personal chattels and machinery which are comprised

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in one schedule. There is one covenant to pay. Where a statute voids a thing it is void altogether. (Counsel referred to *Payne v. Mayor of Brecon*, 3 H. & N. 572; *Pickering v. Ilfracombe Railway Co.*, L. R. 3 C. P. 235; 16 W. R. 458.)

January 30th.

FRY, L.J., delivered the judgment of the Court:

Judgment.

The relevant facts of this case are few. On June 25th, 1886, Burdett executed to Byrne and Furze a deed of security. By this deed, in consideration of goods of the value of 50*l.*, to be immediately delivered to Burdett by Byrne and Furze, and of 150*l.* due from Burdett to them for money lent, Burdett assigned to Byrne and Furze certain chattels described in the schedule as security for 200*l.* and interest, and by the deed the borrower declared that he would pay the 200*l.* and interest by certain instalments. With regard to this instrument, it is admitted on the one hand that it does not comply with the terms of the Bills of Sale Act, 1882, and on the other, that amongst the property described in the schedule, there are trade machinery, which are within the exception in section 5 of the Act of 1882, and are therefore not personal chattels for the purposes of that Act. The deed, therefore, is plainly void under section 9 as a bill of sale, so far as regards the personal chattels. Is it equally void as regards the properties which are not personal chattels? The Divisional Court have held that it is, hence the present appeal.

We will first consider the question upon principle. In our judgment, clauses in statutes avoiding transactions or instruments are to be interpreted with reference to the purpose for which they are inserted, and when open to question, are to receive a wide or a limited construction according as the one or the other will effectuate the purpose of the statute (per TURNER, L.J., in *Jortin v. South Eastern Railway Co.*, 6 De G. M. & G. 275). Furthermore, we adopt the language of WILLES, J., in *Pickering v. Ilfracombe Railway Co.* (L. R. 3 C. P. 235, 250), when he said:—"The general rule is, that when you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute, or by the common law, you may reject the bad part and retain the good."

What then was the object and purpose of the legislature in enacting by section 9 of the statute of 1882, that all bills of sale not in accordance with the schedule form should be void? It was to impose certain conditions and terms on instruments, by which securities were created on personal property without the transfer of the property. The legislature were not concerned, and the statute is not concerned with the borrowing on real estate, or on chattels real, or on chattels excepted from its operation by section 5, or with the forms of the instruments by which such borrowing may be effected. We ought, therefore, in our opinion, if the language of the statute be open to that construction, to lean towards construing the statute as affecting securities on personal chattels only, and not securities on other kinds of property. Now in our opinion, not only do the words of the statute make this construction possible, but lean towards it, for what is avoided is the bill of sale, and not every instrument of however complicated or comprehensive a nature, of which a bill of sale is part.

But then arises this question. Can the illegal part of the security be severed from the legal? In our opinion, the nature of the instrument in question permits such a severance to be made, because a security given on properties, A., B., and C., is a security for the whole amount on each of these properties, and on every part of each of them. The excision of one property in law by a statute, or in fact by an earthquake, effects a separation between the properties, and withdraws one of them from the operation of the instrument, but leaves the instrument intact, and still operative as regards the rest. In our opinion, therefore, the elimination of the personal chattels from the security leaves it good as to the machinery, which is not a chattel for the purposes of the Bills of Sale Act.

On principle, therefore, we think that the decision of the Court below is not correct.

But that decision proceeds not on principle, but upon the authority of the case of *Davies v. Rees* (L. R. 17 Q. B. D. 408), which was binding on the Divisional Court, and is binding on this Court. In that case this Court decided, that where a bill of sale contained a covenant to pay, and an assignment of chattels personal, and of no other property, and was bad under the statute as an assignment, the covenant to pay was also avoided by the 9th section

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of the statute. The Court decided that the whole of the instrument then in question was void, not that the whole of every instrument in which a void bill of sale may be embodied, is also necessarily void. The principle of that decision we take to be this: that the 9th section made the whole of a bill of sale, as these words were used in the section, and not merely the assignment contained in it, void, as was shown by a comparison of language of the 8th and 9th sections; that the same 9th section showed by its reference to the schedule, what it meant by a bill of sale, and that on reference it appeared that a covenant to pay was an integral part of the form, and therefore a bill of sale within that section. There were three possible areas over which the avoidance might operate, viz.:—(1) The assignment of chattels only; or (2) everything which appeared as part of a bill of sale in the schedule form; or (3) every part of every instrument in which a bill of sale might be contained. The Court rejected the first as too narrow, but did not accept the third, which we think would have been too wide.

For these reasons, we are of opinion that the deed in this case was not avoided by the statute, as regards the chattels excepted from its operation by the 5th section of the Act, and that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Burney*, for the bill of sale holder.

Thomson & Ward, for the trustee.

Cases relied upon and referred to:—

Roberts v. Roberts, L. R. 13 Q. B. D. 794: 53 L. J. Q. B.

313: 50 L. T. 351: 32 W. R. 605.

In re O'Dwyer, L. R. 19 Ir. 19.

Davies v. Rees, L. R. 17 Q. B. D. 408: 55 L. J. Q. B. 363:

54 L. T. 813: 34 W. R. 573.

Kerrison v. Cole, 8 East, 231.

Davenport v. Whitmore, 2 Myl. & Cr. 177.

Payne v. Mayor of Brecon, 3 H. & N. 572.

Pickering v. Ilfracombe Railway Co., L. R. 3 C. P. 235: 16 W. R. 458.

Jortin v. South Eastern Railway Co., 6 De G. M. & G. 275.

IN RE BEALE, EX PARTE DURRANT.

*Bankruptcy Act, 1883, section 37, and Schedule II.**Proof—Commission on Sale of Property—Introduction of purchaser to Bankrupt*
*—Subsequent purchase from Trustee—Right of Proof.*DIVISIONAL
COURT.BEFORE
CAVE, J.
ANDGRANTHAM, J
1888.January 23rd
and 24th.

On January 7th, 1887, an estate agent, in whose hands the debtor had placed certain property for sale, introduced to such debtor a person with a view to purchase, but no agreement could then be come to as to terms; and the debtor a few days afterwards presented his own petition in bankruptcy.

On January 17th, 1887, further negotiations took place between the person so introduced and the trustee in the bankruptcy in respect of the property, and on January 24th, 1887, the purchase was completed, but a proof subsequently tendered by the estate agent for his commission was rejected by such trustee.

Held: That the sale was brought about in consequence of the introduction, and was traceable thereto; and that the proof for commission must be allowed.

THIS was an appeal from an order of the Judge of the County Court at Bath dismissing the appeal of one *Durrant* against the rejection by the trustee in the bankruptcy of a proof of debt for 68*l.* in respect of commission on the sale of certain property belonging to the bankrupt.

The bankrupt *Beale* was proprietor of the Bear Hotel at Devizes, which hotel he placed in the hands of *Durrant*, who was an estate agent, to sell.

From information received from *Durrant*, one *Sanders* became aware that the property in question was in the market, and on January 7th, 1887, he went to Devizes for the purpose of inspecting it; but on January 8th he wrote to Mr. *Durrant*, saying that he had not been able to agree as to terms.

About the same time *Beale* filed his own petition in bankruptcy in the Bath County Court.

On January 17th, 1887, some further correspondence with regard to the property took place between *Sanders* and the trustee appointed in the bankruptcy, and on January 24th, the property was purchased by *Sanders* for 1,400*l.*

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A proof subsequently tendered in the bankruptcy, however, by Mr. *Durrant* for his commission on the sale was rejected by the trustee, and also by the County Court Judge, and from that rejection he now appealed.

E. Cooper Willis, Q.C. (Broxholme with him): for Mr. *Durrant*.

The simple question is, was *Durrant* the cause of the sale of this hotel? It cannot be suggested that if he had not sent Mr. *Sanders*, the sale would have taken place.

Lock: for the trustee in the bankruptcy.

What *Durrant* was to sell was the lease, business and stock. That was the only authorised arrangement. The contract was to sell on certain terms. The person who authorised the arrangement could not vary the terms because he became bankrupt, and the trustee took advantage of the sale of part of the said property.

[CAVE, J.—That was through the same agent. The estate has had the benefit of the introduction, and surely you cannot come to the conclusion that the ultimate bargain was not the consequence of the introduction.]

The ultimate bargain was one which the original vendor would have absolutely refused. The lease was disclaimed.

CAVE, J.:

Judgment.

I am of opinion that this appeal must be allowed, and I am led to that conclusion, not because I differ from the law as laid down by the learned County Court Judge, but because I cannot put the same interpretation on the facts which he has done. This proof was for commission earned by introducing a purchaser for this hotel. Now, it must be remembered that the duty of the agent is not to arrange the terms of the bargain. His duty is to introduce a purchaser, and if he introduces a purchaser he earns his commission. It is immaterial what is the bargain made between the

vendor and the purchaser. With that he has nothing to do. The question is, has the bargain been brought about by the introduction of the person who makes the claim? In this case, Durrant was undoubtedly employed by Beale; and with the terms of Beale we have nothing to do. Sanders was introduced, who discussed terms with Beale. Those terms are such as Sanders says he cannot accept; and under those circumstances, if Sanders had gone away for good and all, there would have been an end of the matter. The County Court Judge appears to have assumed that Sanders had given up all idea of purchasing, and that the ultimate purchase cannot be traced to the introduction of Durrant. But I do not think that Sanders had given up all idea. All he had given up was purchasing on the terms asked. He was looking for a place, and within three weeks he is informed that this place might be had on different terms. He sees the trustee, and makes an arrangement for purchasing with him. It does not affect the question that the trustee was not privy to the appointment of Durrant. If the trustee had been privy to it, it might be good ground for making him personally liable, but the evidence does not establish that. The question is, the hotel being sold, has the benefit to the estate been traced to the introduction of Durrant? It is clear to me that it is so traced. It cannot be suggested that Sanders would have heard of the place but for Durrant. I quite agree, that if a man had entirely given up all idea of making a purchase, and two or three years afterwards, hearing the place was still for sale, he then bought it, it would be very difficult to trace the connection of the introduction. But here only three weeks had elapsed. Sanders had, in my opinion, no idea of giving up. He was looking for a place, and was only doubtful as to the terms. He lived in London. This place was at Devizes. He would never have thought of the place but for Durrant. The estate has derived a benefit from the introduction of Durrant, and the proof must be allowed.

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 IN RE  
 BEALE,  
 EX PARTE  
 DURRANT.

GRANTHAM, J. :

I entirely agree. A host of cases appear to have been cited when this case was before the County Court Judge, and as to the

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 IN RE  
 BEALE,  
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effect of them, I can only parody the old proverb, and say that, in my opinion, "In the multitude of cases there is confusion."

*Appeal allowed with costs.*

Solicitors: *W. Tanner*, for Mr. Durrant.

*H. A. Dowse*, for the trustee in the bankruptcy.



DIVISIONAL  
 COURT.  
 BEFORE  
 CAVE, J.,  
 AND  
 GRANTHAM, J.  
 1888.  
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 January 24th.

IN RE PHILLIPS, EX PARTE PHILLIPS.

Bankruptcy Act, 1883, section 4, sub-section 1 (g).

Bankruptcy Notice—Judgment Debt—Execution—Interpleader Summons—Stay of Execution.

On July 8th, 1887, judgment was recovered against the debtor, and execution was issued under which the sheriff levied on July 11th.

On July 13th, a third person having claimed the goods, an interpleader summons was issued by the sheriff.

On the same day—July 13th—a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, was served by the judgment creditor upon the debtor, on which a receiving order was subsequently made against him in the County Court.

Held: That at the time when the bankruptcy notice was issued the creditor was not in a position to issue execution; and that the receiving order must be set aside.

THIS was an appeal on behalf of the debtor *Phillips* from a receiving order made against him in the County Court at East Stonehouse.

The case raised the question as to how far an interpleader summons is a stay of execution where a bankruptcy notice is served upon a judgment debtor under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883.

On July 8th, 1887, a judgment was obtained against the debtor *Phillips* by one *Leake*, for 80*l.* 9*s.* 3*d.*, and on July 11th a *fi. fa.* was issued under which the sheriff took possession of the debtor's goods.

On the same day, however, a claim to the goods was made by one *Shapcott*, and on July 13th, the sheriff issued an interpleader summons returnable on July 19th.

On July 13th—the day on which the interpleader summons was issued—a bankruptcy notice under section 4, sub-section 1 (g), was served by *Leake*, the judgment creditor, upon *Phillips*; and on July 15th, *Leake* wrote to the sheriff saying that he should not appear to the interpleader summons which on July 19th was adjourned generally in default of appearance of any of the parties.

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EX PARTE
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On July 22nd, 1887, a bankruptcy petition was presented by *Leake* against the debtor, by which it was alleged that he had failed to comply with the terms of a bankruptcy notice, requiring him to pay the judgment debt on which execution had not been stayed.

On August 11th, 1887, a receiving order was made in the East Stonehouse County Court, and from that order the debtor now appealed.

E. Cooper Willis, Q.C. (F. C. Willis with him): for the debtor.

The interpleader summons was running during the time of the bankruptcy notice. The words of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, are "If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed," &c., and in the case of *In re Ford, Ex parte Ford* (see *ante*, Vol. III., p. 288 : L. R. 18 Q. B. D. 369), "On August 23rd, 1886, judgment was recovered against the debtor, and execution was issued under which the sheriff levied on August 26th. On September 1st, a third person having claimed the goods, an interpleader order was obtained by the sheriff under which the claimant paid 120*l.* into Court, and thereupon in pursuance of the order the sheriff withdrew from possession. On September 20th, the issue in the interpleader was settled; but on September 27th, before such issue was decided, the judgment creditor served on the debtor a bankruptcy notice. On an appeal from the decision of the County Court Registrar, refusing to set aside the notice, it was held that when the interpleader order was made, and an issue directed, it was in substance a stay of execution until such issue in the interpleader was decided; and that the creditor not being in a position to issue execution on the judgment, was not entitled to serve a bankruptcy notice on the debtor at the date when such notice was served." In effect there is no difference between an interpleader summons issued and still pending and the inter-

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pleader order when made. The goods are in custody, and they may be the goods of the debtor. The sheriff can take no other steps. Here the goods would have satisfied the execution if sold. The execution is stayed, and cannot go on in the ordinary way. Even assuming a difference in this respect between an interpleader summons and an interpleader order, is it within the intention of the Legislature for a creditor to run two horses at the same time?—to make demand for payment when he has put his hand on the property out of which payment is to be made. (Counsel also referred to *Cooper v. Asprey*, 3 B. & S. 932.)

Muir Mackenzie: for the petitioning creditor.

The County Court Judge was of opinion, that before the bankruptcy notice was issued, all interpleader proceedings had been abandoned, and in fact, that the execution was withdrawn.

[CAVE, J.—The sheriff was in possession up to July 19th.]

Further, this case is not in any way like *In re Ford, Ex parte Ford* (see *ante*, Vol. III., p. 283: L. R. 18 Q. B. D. 369). There an interpleader order was obtained.

CAVE, J.:

Judgment.

I am of opinion that this appeal must be allowed. The case does not appear to have been argued before the County Court Judge with any great attempt to influence his mind either one way or the other, the prevailing impression being that it would be settled, and in the County Court it seems to have been dealt with by all parties upon that assumption. But the settlement did not come off, and the parties are, therefore, here. Now, when the facts of this case are heard, it appears really to be concluded by *In re Ford, Ex parte Ford* (see *ante*, Vol. III., p. 283). On July 11th, 1887, execution was issued, and the goods seized. The moment the goods were seized—seized to the extent of the judgment debt—there was no power to issue any further execution. Nothing could be done until a return had been made, or the execution got rid of by abandonment or otherwise. Here the execution was on July 11th, and on July 13th the sheriff issued an interpleader summons. On

July 15th, the creditor wrote that he did not intend to appear on the interpleader summons, and I think on that, the sheriff might have gone out. But that letter was not until July 15th, and in the meantime—on July 13th—the bankruptcy notice was issued. Consequently, when the bankruptcy notice was issued, an execution was in full force, on which the sheriff was in possession. The creditor was therefore not in a position to issue execution. It would, in my opinion, be very unjust that a creditor could issue a *fi. fa.*, and at the same time, a bankruptcy notice on failure to comply with the terms of which the debtor commits an act of bankruptcy. It has been said that the goods seized may turn out not to be the goods of the debtor, and no wrong may, therefore, be done to him. That may be so. But until the creditor directs the sheriff to withdraw, or the claim is decided against him; and so long as he insists on his execution, he still has it, and is estopped from saying that he has not. In my opinion, therefore, the creditor here, at the time when the bankruptcy notice was issued, was not in a position to issue execution, and the appeal must be allowed.

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 PHILLIPS.

GRANTHAM, J.:

I am of the same opinion.

Appeal allowed with costs.

Solicitors: *Ford & Ford*, for the debtor.

Batchelor, for the petitioning creditor.

Cases relied upon or referred to:—

In re Ford, Ex parte Ford, see *ante*, Vol. III., p. 283: L. R.

18 Q. B. D. 369: 56 L. J. Q. B. 188: 56 L. T. 166.

Cooper v. Asprey, 3 B. & S. 932.

DIVISIONAL IN RE STEPHENSON, EX PARTE THE OFFICIAL RECEIVER.
COURT.

BEFORE

CAYE, J.,

AND

GRANTHAM, J. Proof—Act of Bankruptcy—Assignment for benefit of creditors—Release of debts
1888. —Right of parties to assignment to prove.

January 30th
and 31st.

Bankruptcy Act, 1883, section 4, sub-section 1 (a).

On September 1st, 1887, the debtor executed a deed of assignment for the benefit of all his creditors, to which the respondent to the present appeal was a party, being a creditor and also trustee under the said deed, which contained a clause releasing the debtor from "all debts, claims, and demands whatsoever," which they the said releasing parties had against him up to the date thereof.

On September 23rd, 1887, a bankruptcy petition was presented against the debtor by a creditor who had refused to sign the deed, the act of bankruptcy alleged being its execution, and on October 1st, 1887, a receiving order was made.

The official receiver as trustee disallowed the proofs tendered by the creditors who had signed the deed, amongst others that of the present respondent, on the ground that by executing it they had released their debts, but the proofs were subsequently allowed by the County Court Judge, from whose decision the official receiver appealed.

Held: That the question was one of intention: that the intention was that the deed was not to operate in the event of bankruptcy, and the release was to hold good in case the consideration for which it was given should hold good, and not otherwise; and that the creditor was entitled to prove.

THIS was an appeal from an order of the Judge of the County Court at Nottingham, reversing the rejection by the Official Receiver, as trustee in the bankruptcy, of a proof of debt tendered by one *F. G. Hazzledine*, and allowing the said proof.

On September 1, 1887, the debtor *H. G. Stephenson* executed a deed of assignment for the benefit of all his creditors, which deed was signed by the debtor, and amongst other creditors by *Hazzledine*, who also became trustee under the deed.

The deed (*inter alia*) provided as follows:—

"Whereas the debtor is indebted to various persons, and being unable to meet his engagements, has determined to convey and assign all his estate and effects unto the trustee upon the trusts hereinafter expressed:—Now this indenture witnesseth that in consideration of the premises and of the provisions hereinafter

contained, He, the debtor, as beneficial owner, doth hereby convey and assign unto the trustee all and singular the lands, tenements and hereditaments, goods, chattels, moneys, credits, estate and effects whatsoever and wheresoever of or to which the debtor is seized, possessed or otherwise, &c. * * * And this indenture also witnesseth that in consideration of the premises they the said creditors parties hereto do and each of them doth hereby release the debtor from all debts, claims and demands whatsoever which they the said releasing parties or any or either of them, their or any or either of their partner or partners, now have or hereafter may have against the debtor, his heirs, executors or administrators for or in respect of any debt, transaction, matter or thing, up to the date of these presents: Provided always, and it is hereby expressly declared and agreed, that the said release to the debtor hereinbefore contained shall not extend or be construed to extend, to exclude, or prevent any of the said creditors parties hereto from suing any other person or persons who may have become bound as surety or sureties of the debtor, or who is or are in any manner liable for the payment of any debt or debts of the debtor, but that the said creditors parties hereto respectively shall have the same remedies against the surety or sureties or other person or persons as the said creditors parties hereto respectively might have had if these presents had not been made ”

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On September 23rd, 1887, a bankruptcy petition was presented against the debtor by one *Lampard*, a creditor who had refused to sign the deed, the act of bankruptcy alleged being the execution of the said deed, under section 4, sub-section 1 (a), of the Bankruptcy Act, 1883.

On October 1st, 1887, a receiving order was made against the debtor in the Nottingham County Court.

On October 14th, 1887, the first meeting of creditors was held, when twenty-four creditors carried in their proofs, but the proofs of five of the largest creditors, including that of *Hazzledine* for 108*l.* 9*s.* 11*d.*, were disallowed by the official receiver, on the ground that by executing the deed above mentioned they had released their debts and were not entitled to prove; and the official receiver endorsed upon the respective proofs so disallowed the following memorandum :—“ I disallow for the purpose of voting this proof on

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the ground that a deed of assignment for the benefit of the creditors of the debtor dated September 1st, 1887, containing a release as therein mentioned of the creditor's debt, has been executed by the proving creditor."

On December 6th, 1887, the County Court Judge on the application of *Hazzledine* reversed this decision of the official receiver, and directed the proof to be admitted with costs against the estate, on the grounds that the release was not an absolute one, and that the consideration given having failed owing to the subsequent bankruptcy of the assignor, the debts so released had revived.

The official receiver now appealed to the Divisional Court in Bankruptcy.

Sir R. Webster, Q.C., Attorney-General (*Sir Edward Clarke, Q.C.*, Solicitor-General, and *Muir Mackenzie* with him):
for the official receiver.

The release was an unconditional one, and *Hazzledine* was trustee of the deed which contained it. The deed is an act of bankruptcy. Under those circumstances the creditors signing—and certainly this creditor—cannot prove. There was a case of *In re Ireson*, which has not been thought worth reporting, heard some little time ago before your lordship, Mr. Justice CAVE, in which circumstances somewhat similar to this did arise. But there at the time of the execution of the deed it was agreed by all the parties that the deed was not to operate in case of bankruptcy, or unless all the creditors assented to it. The trustee was called and proved that such was the case. As to this case, I say that although an act of bankruptcy the deed is not void. Any residuum there might be in the hands of the trustee in the bankruptcy would be affected by the trusts of this deed. This is an unconditional release in consideration of a *cessio bonorum*. It was the intention of the Legislature that these deeds when there is an unconditional release should be put an end to. There being an absolute release the debt is gone. My whole point is, that as between the official receiver and the creditor who has signed, his debt is barred under the bankruptcy. As to the question whether I am right in saying that the trusts of the deed were binding on the debtor notwithstanding the bankruptcy I would refer to *Small v.*

Marwood (9 B. & C. 300); *Tetley v. Wanless* (L. R. 2 Ex. 21); *Ex parte Bell*, 1 G. & J. 282; *French v. French* (6 De G. M. & G. 95); *Ex parte Alsop* (1 De G. F. & J. 289). The statute does not say that the deed shall be void, but that it shall be an act of bankruptcy. The creditors might have made the release a provisional one, but it was absolute.

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[CAVE, J.—It might be said that the deed is an act of bankruptcy and is gone, and therefore the creditors may come in and prove.]

That must depend upon two things: something in the statute saying that the deed is gone: and the authorities under previous Acts showing that it is not gone. The deed is alive, except as to non-assenting creditors for whom it is an act of bankruptcy. Moreover, these deeds are altogether contrary to the spirit of the Act. The assenting creditors, if they can keep the deed quiet for three months, really oust the other creditors.

Moulton, Q.C. (Stanger with him): for the creditor.

An important fact is that the position of deeds of this kind does not depend on the Act at all. Certainly they have been in existence since the time of James I., and if creditors who executed these deeds were shut out from proof some case could have been pointed to in the books. Every year hundreds of deeds of this kind are set aside by trustees in bankruptcy. The argument on the other side is most inequitable, and until the present bankruptcy authorities came into existence nobody ever dared to raise such a question in the Court of Bankruptcy, which was supposed to be a Court of Equity. The proceeding is so inequitable that no Court of Equity would permit it. In the case of *French v. French* (6 De G. M. & G. 95), there was not a meddling with the rights of the person who had bought the business, but the money paid was the money of the creditors. The wife had no rights under the deed, and the Court made her trustee for the creditors. But the rights of the person who had bought the business were not interfered with. In the case of *In re Ireson*, your lordship, Mr. Justice CAVE, made use of this expression, "The consideration for the release falls through." The other cases cited have really nothing

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to do with the point. The deed is avoided *ab initio*: the release is avoided *ab initio*; and the trustee cannot avail himself of it. This deed is void as being a conveyance in fraud of the bankruptcy law. It is void *ab initio*, and the trustee in the bankruptcy can take the property for that reason. The trustee cannot say it is void as to one part and not void as to the other. Void for the purpose of getting the property and not void so as to exclude the proofs. (Counsel referred to *Pitcher v. Anderson*, 5 M. & S. 161; *Tappenden v. Burgess*, 4 East, 230; *Lloyd v. Powell*, 5 B. & C. 308; *Smith v. Dresser*, L. R. 1 Eq. 651; 95 L. J. Ch. 385.)

CAVE, J. :

Judgment.

This is an appeal from a decision of the County Court judge at Nottingham, allowing the proof of one Hazzledine. It is contended that that proof ought to be rejected on the ground that Hazzledine had executed a deed whereby he had absolutely released the debt due to him. Now I think it can hardly be doubted that the question in any case of this kind turns upon the intention of the parties and if we find a deed in which it is expressly stated that the release is to be avoided in case of bankruptcy taking place that would be the result and it would be so avoided. On the other hand if it is expressly stated that the release is not to be so avoided in case of bankruptcy then it would not be so avoided and the release would be good. We must gather from the deed here what the intention of the parties was. If we can gather that the release should operate or should not operate in case of bankruptcy, in carrying out whichever intention may be shown we are only giving effect to the deed itself. This indenture of September 1st purports to be made between the debtor, Hazzledine as trustee, and certain creditors. It is not made between the whole body of the creditors, but between the debtor, the trustee, and the creditors who execute the deed. The deed recites the debtor's indebtedness to various persons, &c., and witnesses that the debtor conveys all his property upon trust to sell and to divide the property amongst the creditors. Then come a number of provisions to regulate the rights of the creditors *inter se*, and as to the winding up of the estate. Then comes the release, "that in consideration of the premises they the said creditors parties hereto do and each of them doth hereby

release the debtor from all debts, claims, and demands whatsoever which they the said releasing parties or any or either of them, their or any or either of their partner or partners, now have or hereafter may have against the debtor, his heirs, executors or administrators, for or in respect of any debt, transaction, matter or thing up to the date of these presents." Now it is contended by the appellant that that release is an absolute release. That it was intended to have effect though all the provisions of the deed substantially failed; and that none of the persons executing the deed can prove in the bankruptcy which ensued. Now if we look at the deed and bear in mind that it proceeds from the determination of the debtor to assign his property for the benefit of his creditors generally, and if we look at the provisions for carrying out that and see that there is no single provision providing for what shall be done in case of bankruptcy—all these things taken together tend to show that the true inference is that the parties intended that the release was to hold good so long as the deed could be carried out. For my own part I cannot see how these creditors could intend that this release should be binding notwithstanding whatever might happen. The consequences are serious and I cannot conceive that any one can have intended that. The deed provides that the property is to be divided amongst all the creditors. It is not to be divided amongst a small knot of them. If that were so it might be argued, perhaps, with some foundation, that they intended to take their chance and to release the debtor at all events in consideration of the possibility of making a good thing out of it. But when we see that the object is not for their benefit alone but to divide the property rateably amongst the creditors, it seems impossible to conclude that these creditors intended to put themselves in such a position. If such must be the intention and as soon as a creditor signs he puts it out of his power to prove, the more creditors sign the more this goes on accumulating, and so at last if there remain two or three creditors who have not signed, these two or three have put before them the almost irresistible temptation that if they do sign they will get a small dividend, while if they do not sign they will get their debts paid in full. I cannot believe that that was the intention. I cannot imagine a man intending to give an absolute release on the chance of no one seizing the opportunity of making the

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debtor a bankrupt. I cannot think the creditors ever dreamt that if the debtor should become a bankrupt, yet nevertheless the release was to hold good, and they were to be shut out from all participation in the bankruptcy and only get a possible something when the other creditors were paid in full. I can find nothing to that effect in the deed, and I should certainly require to find something to that effect before I felt inclined to hold that the creditors so intended. I therefore come to the conclusion that the intention was that the release should hold good in case the consideration for which it was given should hold good and not otherwise. In the course of the argument comparison was made between a case of this kind and the case of settlements. But I think the comparison was hardly a fair one, because the persons who take under a settlement are volunteers. In the case of a deed of this kind the creditor is not a volunteer by any means, but is giving something very substantial. The case appears to me to be more like that of a fraudulent preference. A fraudulent preference is an act of bankruptcy. If a man pays the whole debt as a fraudulent preference that amount can be recovered, and if it can be shown that the creditor accepted it in full discharge whether it was hereafter taken from him or not, such discharge would doubtless hold good. But where nothing is said and only the money paid and received it seems to me to be conclusive that the creditor did not intend to receive it in absolute discharge and that he accepted it with the intention that if proceedings in bankruptcy were taken, and the money taken from him, then he might come in in the bankruptcy and prove. I am convinced from the terms of this deed alone that not one of the creditors executing the deed had any notion that they released the debtor so as to preclude their proving in case any dissenting creditor made the debtor bankrupt. It does not seem to me to be necessary to go through the cases which have been cited. No rule can be laid down. The case is one, as I said during the argument, not of law but of fact. One must construe the deed. Does it or does it not appear that the release is to operate whether or no bankruptcy should supervene? Here I think it can beyond all doubt be gathered that the creditors intended that the release should only operate if the deed was carried out. The appeal must therefore be dismissed.

GRANTHAM, J. :

I am of the same opinion. It is not necessary to go through the authorities for they have really very little to do with the case. Although counsel have quoted authorities extending over more than half a century, and although deeds like this have been most common, yet during this period there is no authority which lays it down that when a creditor signs a deed such as this releasing his debt, although the consideration is taken away he is bound by his signature and loses all his debt which he had given up only on consideration that the whole property is divided amongst the creditors. There is not one case to that effect because if there had been I am sure it would have been cited, and that is almost conclusive to my mind that such a contention is absolutely erroneous. I am not at all impressed by the fact which has been practically admitted that the endeavour to set this deed aside has been made in order to prevent creditors from trying to oust the jurisdiction of the Bankruptcy Court when a man cannot pay his debts in full. It may be, as has been said, that sometimes these deeds are frauds, and it may be that the legislature ought to frame an Act of Parliament to put an end to these deeds. But the Attorney-General admitted that in many cases the creditors get more under a deed of this kind than if there was a bankruptcy, and the debtor is in such case relieved from the stigma which attaches to bankruptcy. That is in my opinion strong evidence that a deed like this ought not by a side wind as it were to be set aside. In the present case there was clearly no intention that anyone should be robbed of any right, but what was done was in the interests of the general body of creditors. I should be very sorry if we were compelled to lay down the law in such a manner as to allow such injustice as we have been asked to sanction towards these creditors who acted honestly throughout, so that these creditors should lose their debts to which they were justly entitled. I altogether agree with what my brother CAVE has said and I am clearly of opinion that this appeal ought to be dismissed.

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IN RE
STEPHENSON,
EX PARTE
THE
OFFICIAL
RECEIVER.

Appeal dismissed with costs.

Solicitors : *The Solicitor to the Board of Trade*, for the Official Receiver.

Lee, Ockerby & Everington, for the creditor.

PRACTICE.

COURT OF
APPEAL.
BEFORE
THE MASTER
OF THE ROLLS,
FRY, L. J.,
LOPES, L.J.
1888.

IN RE HENDERSON, EX PARTE HENDERSON.

Bankruptcy Act, 1883, section 4, sub-section 1 (g).

Bankruptcy Notice—Order of Divorce Court for payment of alimony to a wife pendente lite—"Final judgment."

February 3rd.

Held: That an order made in the Divorce Court for the payment to a wife by her husband of alimony *pendente lite* is not a "final judgment" within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon which a bankruptcy notice can be founded on failure of the husband to pay such alimony as directed.

THIS was an appeal on behalf of Mrs. *Ada Henderson* from a decision of Mr. Registrar Brougham, refusing to make a receiving order upon a petition presented by her against her husband, *W. R. Henderson*.

The case raised the question whether an order of the Divorce Court for payment of alimony to a wife *pendente lite* was a "final judgment" within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, upon which a bankruptcy notice could be founded.

On April 25th, 1887, a petition was presented by Mrs. *Ada Henderson* to the Probate, Divorce and Admiralty Division of the High Court against her husband *W. R. Henderson*, who was an army surgeon, for a judicial separation on the ground of his desertion.

In June, 1887, an order was made by Mr. Justice HANNEN for the payment to the wife by the husband *pendente lite* of alimony at the rate of 120*l.* a year, to be paid by monthly instalments of 10*l.* each.

This order was served personally upon the husband but no alimony was paid and five instalments being in arrear, a bankruptcy notice was in October, 1887, issued by the wife against the husband under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, on failure to comply with the terms of which a bankruptcy petition was presented against him.

The learned registrar, however, held that the order for payment

of alimony *pendente lite* was not a "final judgment" within the meaning of the said section and he refused to make a receiving order.

Against this decision Mrs. *Ada Henderson* now appealed.

1888.
IN RE
HENDERSON,
EX PARTE
HENDERSON.

Sidney Woolf: for Mrs. Henderson.

Every means were taken to get the alimony and it was only when payment was obstinately refused that the bankruptcy notice was issued. The registrar was of opinion that Mrs. *Henderson* was not a creditor who had obtained a "final judgment" within the meaning of section 4, sub-section 1 (g). But an order for the payment of alimony is final. The words *pendente lite* only show the period during which the money is to be paid. On this particular *litis contestatio* a more final order could not be obtained. (Counsel referred to *In re Faithfull, Ex parte Moore*, see *ante*, Vol. II., p. 52: L. R. 14 Q. B. D. 627: 54 L. J. Q. B. 190: 52 L. T. 376: 33 W. R. 438.) The case of *Dickens v. Dickens* (31 L. J., P. & M. 183) shows that these arrears are a provable debt. The case of *In re Linton, Ex parte Linton*, (see *ante*, Vol. II., p. 179: L. R. 15 Q. B. D. 239: 54 L. J. Q. B. 539: 52 L. T. 782: 33 W. R. 714), does not touch this case. All that was held there was that future alimony was not capable of estimation. (Counsel also referred to *In re Chinery, Ex parte Chinery*, see *ante*, Vol. I., p. 31: L. R. 12 Q. B. D. 342: 53 L. J. Ch. 662: 50 L. T. 842: 32 W. R. 469: *In re Cohen, Ex parte Schmitz*, see *ante*, Vol. I., p. 55: L. R. 12 Q. B. D. 509: 53 L. J. Ch. 1168: 50 L. T. 747: 32 W. R. 812: *In re Sanders, Ex parte Whinney*, see *ante*, Vol. I., p. 185: L. R. 13 Q. B. D. 476.)

Muir Mackenzie: for the husband was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER):

I am sorry—I am very sorry to say that I think the law does Judgment. not enable us to grant relief in this case in the form in which it is asked. An order had been made for alimony *pendente lite* and in that order, as part of it, it was ordered that that alimony should be 120*l.* a year, payable 10*l.* a month. The question is whether that can be considered to be a final judgment within the Bankruptcy Act. Now it seems to me that whether any order which may be

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called a judgment is a final order or not must be determined on a view of that order at the time when it is made. If it is not a final judgment then it cannot be made a final judgment by circumstances arising after that time. I say that because it has been argued that because in this case there are arrears, that would make the order a final order with regard to the arrears even if it were not so when the order was made. Then the question is, there is the order to pay 10*l.* a month *pendente lite*. Is that a final order? Assuming that if it were final it would be a judgment can you say the order as to paying this money is a final order? An order like this is in the first place *pendente lite*. In the second place it is an order which can be varied and altered at any time. If anything can be interlocutory, this is the most interlocutory order one can imagine. The whole order is most interlocutory and not final. Then can you say that part of the order—to pay 10*l.* a month is in itself final. It is said that it may be so under *In re Faithfull, Ex parte Moore* (see *ante*, Vol. II., p. 52). But that case does not carry us far enough. There the order for payment formed part of a final judgment which determined the main issue in dispute in the action. But this order to pay 10*l.* a month is part of an interlocutory order. The appeal must therefore be dismissed.

FRY, L. J. :

I regret very much that the appellant was advised to take these proceedings. The argument put forward on her behalf could not possibly succeed. The appellant says that she is a creditor who has obtained a final judgment, and that is an order for alimony pending suit at the rate of 10*l.* a month. Now in the first place that order is not a judgment and has none of the characteristics of a judgment which are well known to lawyers. It is a simple order and we cannot hold that a creditor by order is a creditor by judgment. In the next place it is not final. I cannot conceive any order more wanting in finality. It is made *pendente lite*. It is subject to review of the Court and may be altered as to amount and time of payment, &c. It is as little final as any order can possibly be. In the case of *In re Faithfull, Ex parte Moore* (see *ante*, Vol. II., p. 52), the order for payment formed part of a final judgment and that case is altogether distinguishable from this.

LOPES, L. J. :

An order in order to found a bankruptcy notice on it must be part of a final judgment. An order for alimony *pendente lite* can be altered, and it is in my opinion essentially interlocutory. It is in no sense a final judgment, and this appeal must therefore be dismissed.

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THE MASTER OF THE ROLLS (LORD ESHER) :

We must dismiss the appeal, but under the circumstances it will be without costs.

Appeal dismissed without costs.

Solicitors : *Lewis & Lewis*, for Mrs. Henderson.
Tyrrell Lewis & Co., for the husband.



IN RE MILLS, EX PARTE THE OFFICIAL RECEIVER.

Bankruptcy Act, 1883, section 48.

Fraudulent preference—Payment made to creditor "with a view of giving such creditor a preference"—Payment made to creditor with intention of relieving surety.

COURT OF
APPEAL.
BEFORE
THE MASTER
OF THE ROLLS,
FRY, L. J.,
LOPES, L. J.
1888.

February 3rd.

Where upon the evidence it was found that the motive of the bankrupt in making a payment to a creditor of his debt, was not to prefer such creditor but to prevent another person who had become surety for the debtor from being compelled to pay the debt.

Held : That as the payment in question was made not with the intention of preferring the creditor to whom it was made, but with the intention of benefiting another person who was not a creditor, such payment was not within section 48 of the Bankruptcy Act, 1883, and could not be set aside as a fraudulent preference.

THIS was an appeal on behalf of the Official Receiver against an order of the Divisional Court in Bankruptcy affirming an order of the Judge of the County Court at Oldham, by which he decided that a payment of 223*l.* 12*s.* 9*d.* made by the bankrupt *Mills*

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shortly before his bankruptcy to one *Whittaker*, a creditor, was not a fraudulent preference within section 48 of the Bankruptcy Act, 1883.

In the year 1882 the debtor *Mills* borrowed from *Whittaker* the sum of 260*l.* for the purpose of purchasing the Weir Hotel, two promissory notes being given for 200*l.* and 60*l.* respectively, one *Greenwood* being surety.

The debtor fell into difficulties, and subsequently disposed of his interest in the hotel to a purchaser named *Roberts* for 223*l.* 12*s.* 9*d.*

On January 31st, 1887, a writ was issued by *Whittaker* against *Mills* and *Greenwood* in respect of the debt due to him, and *Mills* thereupon handed over to the creditor the 223*l.* 12*s.* 9*d.* he had received.

In February, 1887, a bankruptcy petition was presented against *Mills* in the Oldham County Court and the Official Receiver subsequently made an application to that Court for an order declaring the payment so made to *Whittaker* a fraudulent preference within section 48.

The learned County Court Judge, however, found upon the evidence that the motive of the bankrupt in making the payment was not to prefer *Whittaker*, but to prevent the surety *Greenwood* from being compelled to pay the debt, and he refused the application on that ground.

This decision having been affirmed on appeal by the Divisional Court sitting in Bankruptcy, the official receiver now appealed to the Court of Appeal.

Muir Mackenzie (*Sir Edward Clarke*, Solicitor-General, with him) : for the official receiver.

The County Court Judge said that the payment was not a payment to give *Whittaker* a preference but to protect *Greenwood* the surety, and therefore was not a fraudulent preference. But section 48 of the Bankruptcy Act says, "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in

trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

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[FRY, L.J.—If the County Court Judge found that the intention of the debtor was not to prefer the creditor, but to favour the surety who is not a creditor, surely you are not within the words of the statute !]

Taking the whole finding together, the view was to give *Whittaker* a preference. The effect would be to pay *Whittaker* to the prejudice of the other creditors. The payment must benefit *Whittaker* because it relieves him from having to go against *Greenwood* who might not be solvent. The case most against me is *In re Goldsmid, Ex parte Taylor* (L. R. 18 Q. B. D. 295 : 56 L. J. Q. B. 195 : 35 W. R. 148). There it was held that "In order that a payment or transfer of property made by a bankrupt within three months before the presentation of the petition on which he was adjudicated a bankrupt, should amount to a fraudulent preference within section 48 of the Bankruptcy Act, 1883, it is essential that it should have been made by him with a view of giving a preference to the creditor to whom it was made ; and it is not sufficient that the creditor was in fact preferred. The Court must, therefore, in each case consider as a question of fact what was the real or dominant motive of the bankrupt in making the payment or transfer, and if the Court comes to the conclusion that (for example) the bankrupt's real motive was to save himself from exposure or from a criminal prosecution, the payment or transfer is not a fraudulent preference. It is also essential that the relation of debtor and creditor should have existed between the parties at the time when the payment or transfer was made. Consequently, a voluntary payment to make good a breach of trust committed by the bankrupt is not within section 48." But that case must be read with reference to the particular facts. There all the motive was the motive between the debtor and the creditor.

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 Judgment.

Winslow, Q.C. (Herbert Reed with him) : for the creditor were not called upon.

THE MASTER OF THE ROLLS (LORD ESHER) :

I will not say that the question of fraudulent preference is different under the statute to what it was before because I think always the question was left to the jury, what was the intention of the debtor's mind? In this case on the findings of the County Court Judge unless we fly in the face of the Act of Parliament, and of *In re Goldsmid, Ex parte Taylor* (L. R. 18 Q. B. D. 295), it is impossible to say that there was a fraudulent preference here. In that case it is said that the words "with a view" in section 48 are equivalent to "with the intention," and you have to find the real intention of the man's mind. Was it with the intention of giving the creditor a preference that the payment was made? Under the statute it is not sufficient if the debtor paid one creditor in order to favour another. Still less would it be a fraudulent preference if the payment has been made to benefit himself. That has been decided. Still less is it so if the debtor makes the payment to a creditor with intent to advantage someone else who is not a creditor. Here the findings are that the debtor made the payment in favour of Whittaker. True, but what was his intention? It has been found that he did not intend to prefer Whittaker, but to give an advantage to Greenwood. Now Greenwood is not a creditor at all. The case is therefore not within the words of the section, and to hold otherwise would be directly opposite to what was decided in *In re Goldsmid, Ex parte Taylor*.

FRY, L.J. :

I am of the same opinion. The statute appears to me to be very plain. It avoids a payment to a creditor with a view to give *such* creditor a preference. Here the County Court Judge found that the view of the debtor was not to prefer Whittaker but Greenwood who was a surety and not a creditor at all. It is impossible to decide in favour of the official receiver here without flying in the face of *In re Goldsmid, Ex parte Taylor* (L. R. 18 Q. B. D. 295), and I think this case is absolutely decided by that.

LOPES, L.J. :

In my opinion the finding of the County Court Judge and the case of *In re Goldsmid, Ex parte Taylor* (L. R. 18 Q. B. D. 295), dispose of this case. I expressed my view of section 48 of the Bankruptcy Act, 1883, when we decided *In re Goldsmid*, and I do not desire to repeat myself.

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Appeal dismissed with costs.

Solicitors : *The Solicitor to the Board of Trade* : for the official receiver.

Shaw & Tremellin, for the creditor.

PRACTICE.

IN RE RIDDELL, EX PARTE EARL OF STRATHMORE.

Bankruptcy Act, 1883, section 4, sub-section 1 (g).

*Bankruptcy Notice—Order in Chancery Division dismissing action with costs—
“Final judgment.”*

COURT OF
APPEAL
BEFORE THE
MASTER OF
THE ROLLS,
FRY, L. J.
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An action in the Chancery Division of the High Court by which the plaintiff claimed to be entitled to certain estates held by the defendant, having been dismissed for want of prosecution with costs, and such costs not being paid, a bankruptcy notice was issued against the debtor in respect thereof.

Held: That the order in question was not a “final judgment” within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon which a bankruptcy notice could be founded.

Per LORD ESHER, M.R. : That a “final judgment” in the said sub-section means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour either of the plaintiff or the defendant.

February 17th.

THIS was an appeal from a decision of the Divisional Court sitting in Bankruptcy affirming an order of the County Court Judge at

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Newcastle, by which he dismissed a petition for a receiving order presented by the *Earl of Strathmore* against the debtor *Riddell*.

The case raised the question whether an order dismissing an action in the Chancery Division of the High Court for want of prosecution, with costs, was a "final judgment" within section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon which a bankruptcy notice could be founded.

An action was commenced in the Chancery Division against the *Earl of Strathmore* by the debtor *Riddell*, who claimed to be entitled to large estates now held by the Earl in Yorkshire and Durham.

The plaintiff, however, appeared unable to frame a proper statement of claim, although leave to amend was given on two or three occasions, and on June 10th, 1887, an order was made by Mr. Justice NORTH in the following terms:—"On the application of the defendant the Earl of Strathmore, and on hearing, &c., and reading, &c., it is ordered that this action do stand dismissed out of this Court for want of prosecution," and it was further ordered that the plaintiff should pay the costs.

The costs were subsequently taxed at 53*l.*, and not being paid, a bankruptcy notice under section 4, sub-section 1 (g) was issued against the debtor, but a petition for a receiving order presented on the failure of the debtor to comply with the terms of such notice, was dismissed by the County Court judge on the ground that the order on which the bankruptcy notice was founded was not a "final judgment" within the meaning of the section, and that decision was affirmed by the Divisional Court in Bankruptcy.

The *Earl of Strathmore* now appealed to the Court of Appeal.

Napier Higgins, Q.C. (Stephen with him): for the Earl of Strathmore.

The order was a final order. It put an end to the action and had all the elements of finality. It is final in effect and is a judgment in effect. (Counsel referred to *In re Cohen, Ex parte Schmitz*, see *ante*, Vol. I., p. 55: L. R. 12 Q. B. D. 509: 53 L. J. Ch. 1168: 50 L. T. 747: 32 W. R. 812: *In re Chinery, Ex parte Chinery*,

see *ante*, Vol. I., p. 81 : L. R. 12 Q. B. D. 842 : 53 L. J. Ch. 662 : 50 L. T. 842 : 82 W. R. 469.) Then in *In re Faithfull, Ex parte Moore* (see *ante*, Vol. II., p. 52 : L. R. 14 Q. B. D. 627 : 54 L. J. Q. B. 190 : 52 L. T. 376 : 88 W. R. 488), "Where in consequence of a breach of covenant of articles of partnership, an action was brought in the Chancery Division and judgment obtained, restraining the defendant from carrying on business within a certain radius—dissolving the partnership—ordering an enquiry as to the amount of damage sustained by the plaintiff—and further ordering the costs of the plaintiff to be paid—and pending the enquiry as to the damages the costs were taxed, and only a portion being paid, a bankruptcy notice was served on the debtor for the remainder." It was held that the sum, in respect of which the bankruptcy notice was served was due under a final judgment within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, the amount in question being wholly independent of the result of the enquiry." Moreover this being an action of ejectment the order is a final judgment, and the same question can never be raised again between the same parties. An action of ejectment only raises the question whether the plaintiff is entitled to possession of the land on the day of the issuing of the writ, and this order has determined that question for ever, because in a second action the plaintiff would have to assert that he was entitled to possession of the land on the day of the issue of the new writ, and he could not raise again the question whether he was entitled to possession on the day of the issuing of the first writ.

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Sidney Woolf : for the debtor Riddell was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER) :

It seems to me that we must decide this case in conformity with Judgment. the construction which has been put upon sub-section 1 (g) by former judgments of the Court of Appeal and that it is not open to us to reconsider the matter or to come to a determination contrary to that interpretation. It is true that the exact subject-matter to which the sub-section has to be now applied is not the same, that is, the circumstances of the present case are not the same as in those former cases, but the question is whether the principle of

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those decisions applied. I think the only two cases which we need consider are *In re Chinery, Ex parte Chinery* (see ante, Vol. I. p. 31), and *In re Faithfull, Ex parte Moore* (see ante, Vol. II., p. 52), for the other two cases which have been cited were expressly decided upon the authority of *Ex parte Chinery*, and we must see what was the rule of interpretation of this section laid down in *Ex parte Chinery* as further explained in *Ex parte Moore*. The principle of the decision in *Ex parte Chinery* was stated by Lord Justice COTTON (L. R. 12 Q. B. D., at p. 345), viz., that the word judgment is to be construed strictly and confined to what was previously known in law as a "judgment" as distinguished from an "order." Moreover the judgment must be strictly a final judgment. COTTON, L. J., said (L. R. 12 Q. B. D., at p. 345), "No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word judgment shall in other Acts of Parliament include an 'order.'" Therefore if the Court comes to the conclusion that the thing which is in dispute is an "order" as distinguished from a judgment, then COTTON, L. J., says, that section 4, sub-section 1 (g), will not authorise the issuing of a bankruptcy notice upon it. Then as to the meaning of the word "final judgment," COTTON, L. J., said, "I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established." That definition has since been criticised and an attempt to amend it was made in *Ex parte Moore* (L. R. 14 Q. B. D. 627). Lord SELBORNE, L. C., said, "To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits." I think that must mean an adjudication of the *litis contestatio*. And with great deference to Lord SELBORNE I cannot help thinking that the words "upon the merits" might have been omitted, and that the definition should have been "a proper *litis contestatio* and a final adjudication of it between the parties." Then, Lord SELBORNE added "No doubt in the opinions of some of the learned judges which have been read to us there are one or two expressions which seem to imply that the

judgment must be one by which a previously existing liability of the defendant to the plaintiff is ascertained, but those expressions must be taken in connection with the particular facts of the cases in relation to which they were used." I do not see much difference between that proposition and the other which he had already laid down, and I do not think that Lord SELBORNE could have intended in the latter part of his judgment to contradict that which he had said in the former part. I think he was to some extent criticising the use of the words "pre-existing liability" and saying that instead of them he would prefer to put it "a pre-existing *litis contestatio*," that is, as I understand him, one by which the question whether there was a pre-existing right of the plaintiff against the defendant is ascertained. The decision may be either that there was, or that there was not, such a pre-existing right, but in either case the question whether there was such a right will become an ascertained and adjudged matter. Then Lord Justice COTTON finding that his former definition had been criticised said, "In order to decide whether a garnishee order was a final judgment we had to consider what was the meaning of the expression "final judgment." It is a judgment in an action between parties brought to establish some right of the plaintiff against the defendant." Then, he went on to say that his former definition, "by which a previously existing liability of the defendant to the plaintiff is ascertained or established," had been criticised, and that it had been suggested that that definition would not include a judgment in an action of tort. But he added, "If a defendant has committed a tort there is a previously existing liability on his part to the plaintiff," by which he means a pre-existing liability to damages. "So here," he continued, "there was a previously existing liability of the defendant, arising out of his covenant contained in the partnership deed." Of course the order for the payment of costs did not enforce a pre-existing liability of the defendant, but the order is part of a final judgment, which did, that is to say, there is no pre-existing right or pre-existing liability as regards costs which follow the result of the action. But when as in *Ex parte Moore* an order to pay costs is part of a final judgment which determines the question whether there was a pre-existing right of the plaintiff against the defendant that order itself is a final judgment for the purposes of section 4, sub-section 1 (g). I have no

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doubt that there may be a better definition than that which I am about to give. I do not pretend that it is strictly correct, but in my opinion a "final judgment" means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour either of the plaintiff or the defendant. I think the definition will be found to cover most cases, though perhaps not every one. Then comes the question whether the order in the present case is such a judgment. Now here the plaintiff brought the action to enforce a claim of right which he alleged existed before and at the time when he brought the action, against the defendant, and the question is was that claim finally determined? Of course it was not determined if "on the merits," meant upon a trial when the facts were brought before a tribunal which had to determine them. But I do not think that Lord SELBORNE meant that when he said "on the merits." In my opinion the question is, was the issue finally determined? It could only have been finally determined if between the two parties to the action it cannot be raised again. If between the two parties the question of the plaintiff's alleged right as existing before he brought that action was finally determined then whether it was tried "on the merits" or not, the order (assuming that it was a "judgment," a question which I do not intend to decide), is a "final judgment." But cannot the same question be tried again between those parties? There can be no doubt that this order was equivalent to a judgment of non-suit, and such a judgment was never regarded as a final determination of the dispute between the parties, because the plaintiff by amending his evidence could maintain the same claim in a second action after a judgment of non-suit in the first. Then Mr. Stephen, with admirable ingenuity says, that this being an action of ejectment, the order is a "final judgment," and the same question can never be raised again between the same parties. He says that an action of ejectment only raises the question whether the plaintiff is entitled to possession of the land on the day of the issuing of the writ, and that this order has determined that question for ever, because in a second action the plaintiff would have to assert that he was entitled to possession of the land on the day of the issue of the new writ, and that he could not raise again the question whether he was entitled

to possession on the day of the issuing of the first writ. That is an ingenious argument but unfortunately it is not true that an action of ejectment has ever been so treated. If that proposition were true it would follow that when an action of ejectment had been fully tried out and a decision come to, the question could be tried over again between the plaintiff and the defendant immediately afterwards. That is not the law. The judgment in an ejectment action like that in any other action is a final decision between the parties of the right to the property claimed and there is no ground for the suggested distinction.

Applying the principles laid down in the two cases on which I have commented, this order, assuming it to be a judgment, was not a "final judgment," and therefore the appeal fails.

FRY, L. J. :

I am of the same opinion. To my mind the order made by Mr. Justice NORTH, which is in terms an "order," is also in substance an "order." I greatly doubt whether it would be possible to hold that it was a "judgment." I think the distinction between "judgments" and "orders" is still an existing one. But even supposing it to be a "judgment" we have to consider whether it is a "final judgment." Has there been in the present case any final and conclusive adjudication of the matter in controversy in the action? It is said that there has been as final an adjudication as there possibly can be in such an action, because in an action for ejectment the only question raised is the title to possession of the land at the date of the issue of the writ, and that question can never be raised in any other action of ejectment. But in the present case it is not the fact that the action is a mere action of ejectment. The writ asks for a declaration of the plaintiff's title to the land, and if that declaration had been made either for or against the plaintiff, it would be impossible as it seems to me to say that it would not have been a final adjudication of the title of the plaintiff and the defendant, not only with regard to the date of the writ, but down to and including the time of the trial; and I cannot for a moment doubt that that declaration might have been pleaded as *res judicata* to a fresh action by the plaintiff. There would therefore have been finality in the declaration of the title if the action had been deter-

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mined in the usual way. But inasmuch as a new action for a declaration of title could be commenced the day after the first action was dismissed for want of prosecution, the order so dismissing it was not as final as an order in the ordinary course would have been. Therefore it is not a "final judgment."

LOPES, L. J. :

I express no opinion whether this order is a "judgment," but I am clearly of opinion that it is not a "final judgment." It cannot be disputed that this order dismissing the action for want of prosecution does not preclude the plaintiff from commencing a fresh one for the same cause of action. To my mind that seems a conclusive answer to the question whether this order is a "final judgment." I think it is not, and therefore I think that the decision of the Divisional Court was right.

Appeal dismissed with costs.

Solicitors : *Western & Sons*, for the Earl of Strathmore.
Stanford, Newcastle, for the debtor.

PRACTICE.

IN RE STANIAR, ROBERTS & CO., EX PARTE SMITH.

*Bankruptcy Act, 1883, section 18, sub-section (6).**Scheme of Arrangement—Approval of Court—Sale of Assets Difficult to Collect—
Security for Scheme—Discretion.*DIVISIONAL
COURT.BEFORE
CAVE, J.
AND
GRANTHAM, J.
1888.
January 23rd.

It is not right to lay down a general doctrine to apply to all schemes of arrangement that adequate security for the carrying out of a proposed scheme is absolutely essential, and that the absence of such adequate security must in all cases preclude the Court from granting its approval; although where some guarantee might reasonably be expected this fact ought to be taken into consideration.

Thus, where the debtors were merchants having a house of business in England and a house in South America, the assets forming the principal part of the estate being in South America, out of the jurisdiction of the Court, and a scheme of arrangement was proposed for a sale of these assets to one of the partners who resided in South America for about their estimated value, on terms that the purchase-money should be paid by quarterly instalments extending over four years, the purchaser's life to be insured by the trustee for about one-sixth of the amount payable, there being no other provision as to security, but the scheme was recommended by a responsible committee of inspection who were creditors for a large amount and by an accountant who had been sent out to South America for the purpose of investigation, while the official receiver reported in favour of the said scheme.

Held: That under the circumstances of the case the proposed scheme was reasonable, and calculated to benefit the general body of creditors; and that the approval of the Court ought to be granted.

THIS was an appeal from an order of the Judge of the County Court at Manchester refusing to approve a scheme of arrangement accepted by the creditors under section 18 of the Bankruptcy Act, 1883.

The firm of *Staniar, Roberts & Co.* carried on business partly in Manchester and partly in South America, and consisted of four persons, *P. S. Staniar* and *C. Roberts*, who lived in Manchester and traded as *Staniar, Roberts & Co.*; and Messrs. *Hodgkinson & Brierly*, who lived in Chili and carried on the business in that country as *Hodgkinson, Brierly & Co.*

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STANIER,
ROBERTS
& Co.,
EX PARTE
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In 1886 the Manchester firm became involved in difficulties owing to dealing in accommodation bills with one *Campbell* who failed, and on November 4th, 1886, a petition was filed by all the four debtors and a receiving order made against them, the debts of the firm being about 80,000*l.* with assets about 60,000*l.*, but with the exception of about 4,000*l.* in Manchester these assets were in Chili, and consisted chiefly of goods unsold in stock and debts for goods sold not collected.

A scheme of arrangement was subsequently put forward by which it was proposed that the South American assets should be sold by the trustee to *Hodgkinson*, one of the Chilian partners, the other partner *Brierly* having previously died, for 58,000*l.* payable in four years by quarterly instalments: that the trustee and the committee of inspection should have an absolute discretion to decide as they thought fit all claims by creditors to liens or security, whether by payment in full or otherwise: and that the payment of the purchase-money should be guaranteed by a policy on *Hodgkinson's* life for 10,000*l.* This scheme was accepted by a committee of inspection consisting of men of known business capacity in Manchester; by creditors to the extent of 50,000*l.*; and by Mr. Garnett, an accountant who had been specially sent out to Chili by the committee to examine into the affairs there.

The official receiver reported as follows:—

“That at the adjourned fresh first meeting of creditors held at Ogden's Chambers, Bridge Street, Manchester, on December 1st, 1887, the following resolutions were passed unanimously, viz.:—

“1. That the proposal of the said *George Henry Hodgkinson* for a scheme of arrangement approved by the executrix of the said *John Edward Brierly* and set forth in the paper writing hereunto annexed and marked with the letter ‘A’ be entertained.

“2. For all purposes of the scheme connected with proofs of debts or with the rights of any creditors who hold or claim liens or other securities upon the property of the four partners or any of them the scheme shall have effect in like manner as nearly as may be as if the four partners had been adjudged bankrupt and the said *David Smith* had been appointed trustee under such adjudication and the said committee had been appointed a committee of inspection thereunder and if any question shall arise as to the claim of

any creditor or creditors to any lien or other security upon goods or the proceeds of sale thereof the trustee and committee shall have full power to settle such question and if they think proper to pay any claim in full out of the aforesaid purchase-moneys without litigation and generally to deal with such claim upon such terms as they shall think fit.

" 3. Upon approval of the scheme by the Court the trustee shall obtain possession of all moneys and effects belonging to the estate of the said firm of *Staniam, Roberts & Co.* which shall or may be in the hands or under the control of the official receiver or of the Board of Trade or which are not included in the sale referred to in the said proposal (which moneys and effects shall accordingly so far as necessary or proper vest in such trustee) and shall apply the same in like manner as the said purchase-moneys are therein proposed to be applied.

" 4. If the said *David Smith* or any future trustee under the scheme shall while the scheme is in force die or go to reside abroad or desire to be discharged from or refuse or become unfit to act or incapable of acting as trustee the committee may appoint a new trustee who shall thereupon act in the trusteeship as fully and effectually as if he had been by the scheme originally appointed a trustee.

" 5. The acts of the majority of the committee shall for all purposes of the scheme be deemed to be the acts of the whole and if any of them shall die or go to reside abroad or desire to be discharged or refuse or become incapable of acting or unfit to act as a member of the committee it shall be lawful for a majority in number representing three-fourths in value of the said creditors whose respective debts amount to 10*l.* or upwards by any writing to appoint one of the creditors duly qualified to act in his place as a member of the committee and the person so appointed shall thereupon occupy the same position and have the same powers and duties as if he had originally been one of the committee."

The Scheme of Arrangement referred to in the first of such resolutions is in the following terms :—

" 1. That Mr. *David Smith*, of No. 22, Booth Street, Manchester, chartered accountant, shall sell and transfer all his interest as trustee appointed by the resolutions passed in this matter by the

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creditors in the property in Chili and Bolivia belonging to the firm of *Hodgkinson, Brierly & Co.* to the said *George Henry Hodgkinson* and that the said *George Henry Hodgkinson* shall purchase the same for the sum of 58,000*l.* payable by sixteen instalments of the following amounts, namely, * * *.

"2. In payment of such respective instalments the said *George Henry Hodgkinson* shall remit to the said trustee good bills of exchange payable in England ninety days after sight drawn or endorsed by the said *George Henry Hodgkinson* which bills are to be in the hands of the trustee on the following dates (namely)
* * *

"3. The said *George Henry Hodgkinson* may if he thinks fit make payments to the trustee in advance of any of the said respective dates which payments shall be applied towards the instalment next falling due and the said *George Henry Hodgkinson* shall be entitled to a rebate of interest at the rate of $7\frac{1}{2}$ per centum per annum in respect of any payments so made in advance.

"4. The trustee may with the sanction of the committee of creditors extend the time for the payment of any of the aforesaid instalments and waive any default which the said *George Henry Hodgkinson* may make in the payment thereof but in that case the said *George Henry Hodgkinson* shall pay to the said trustee interest at the rate of $7\frac{1}{2}$ per centum per annum for the time during which any instalment may be overdue.

"5. If the said *George Henry Hodgkinson* shall make default in payment of any of the instalments for two calendar months after the date when the same is due or (as the case may be) after the date to which the trustee may have granted an extension of time as aforesaid then the whole of the aforesaid instalments shall become at once due and payable.

"6. All moneys which shall come to the hands of the said trustee in respect of the said purchase-moneys or of interest thereon and all moneys and effects belonging to the estate of the said firm of *Staniar, Roberts & Co.* which shall or may be in the hands or under the control of the official receiver or of the Board of Trade or which are not included in the sale hereinbefore referred to and which moneys and effects shall immediately upon the approval of this scheme be receivable by the said trustee and shall accord-

ingly so far as necessary or proper vest in such trustee shall (after payment of the costs of and incidental to the receipt thereof) be applied in the first place in payment of all costs charges expenses and other moneys mentioned in Rule 205 of the Bankruptcy Rules, 1886, including therein (but not so as to exclude by inference any proper costs charges and expenses not herein expressly mentioned) the costs charges and expenses of and incidental to a previous unsuccessful proposal for a scheme of arrangement and of and incidental to the journey of Mr. *John Philip Garnett* to and from and his sojourn in South America in connection with the negociation of this proposal with the said *George Henry Hodgkinson* and his remuneration for such negociation so far as such costs charges and expenses can be legally charged against the estate available for distribution amongst the creditors, and in the second place (subject to the payment from time to time to the trustee under the scheme of a reasonable remuneration to be fixed by the said committee for his services and subject also to the payment of all proper costs and charges incurred in connection with the carrying out of the scheme subsequently to the date of the approval thereof by the Court) in or towards payment of the debts due from the firm of *Staniar, Roberts & Co.*, to persons or companies resident or trading in the United Kingdom or the Continent of Europe or the United States of America all of whom are hereinafter referred to as the said creditors Provided always that if any of the creditors shall receive payment of any part of his debt by means of any proceedings taken or demand enforced against the said *George Henry Hodgkinson* in Chili or against property of the debtors receivable in Chili or Bolivia such creditor shall give credit for all moneys so received before becoming entitled to any dividend under the scheme.

"7. Upon approval of the scheme by the Court the said *George Henry Hodgkinson* and the executrix of *John Edward Brierly* deceased shall be released from the debts due from them or from the firm of *Staniar, Roberts & Co.* or from the firm of *Hodgkinson, Brierly & Co.* to the said creditors but without prejudice to any rights given to such creditors by section 18, sub-section 11, of the Bankruptcy Act, 1883.

"8. If the scheme be approved the said *George Henry Hodg-*

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kinson will not until all the said instalments shall have been paid to the trustee pay or transfer to the executrix of the said *John Edward Brierly* any moneys or property in respect or on account of the share of the said *John Edward Brierly* or his executrix in the assets of the partnership of *Hodgkinson, Brierly & Co.* and will within twelve months from August 2nd last pay or settle all debts due from the firms of *Hodgkinson, Brierly & Co.*, and *Stanian, Roberts & Co.* respectively to persons other than the said creditors and will indemnify the said trustee and the said purchase-moneys and all other the estate of the said firms or the members thereof which has or shall come to the hands of the trustee against all claims and demands for or in respect of such last mentioned debts.

"If the resolutions hereinbefore set forth be not confirmed and the debtor *George Henry Hodgkinson* be adjudged bankrupt his discharge may be granted forthwith or suspended or wholly refused, or granted subject to any conditions with respect to future earnings or income.

"— That the liabilities expected to rank against the estate as shown by the statement of affairs submitted by the debtor *George Henry Hodgkinson* (and which agree with the estimate of the debtors *Stanian* and *Roberts*) amount to 68,031*l.* 9*s.* 2*d.*

"That the assets appearing by the said statement (after deducting preferential claims amounting to 51*l.* 13*s.* 4*d.*) were estimated by the said debtor *George Henry Hodgkinson* to produce 48,886*l.* 16*s.* 7*d.* and by the debtors *Stanian* and *Roberts* to produce 66,285*l.* 7*s.* less 25 per cent., that is 51,026*l.* 18*s.* 6*d.* net.

"That inasmuch as the terms of the scheme provide for the sale to Mr. *Hodgkinson* of all the assets in Chili and Bolivia and as such assets include those stated by the debtor to have been hypothecated it may be that the amount of the unsecured liabilities will have to be increased by the sum of 20,000*l.* or thereabouts representing the claims of the creditors in whose favour the hypothecations are alleged to have been made.

"That the assets in Chili and Bolivia proposed to be sold to the debtor *George Henry Hodgkinson* for the sum of 58,000*l.* (and which as before stated include the assets alleged to have been hypothecated) were estimated by the debtors *Stanian* and *Roberts*

to be of the net value of 60,903*l.* 3*s.* 2*d.*, and by the debtor *George Henry Hodgkinson* to be of the net value of 64,889*l.* 18*s.* 9*d.* The assets available for the payment of the costs, charges and expenses of, and incident to, the bankruptcy proceedings preferential and secured claims and for distribution amongst the unsecured creditors will consist not only of the said sum of 58,000*l.* but also of the sum of 5,000*l.*, or thereabouts, the amount realized or to be realized from the assets not included in the proposed sale.

"That the proposal made by Mr. *Hodgkinson*, if approved, including the said sum of 5,000*l.*, or thereabouts, is expected to yield a dividend of not less than 12*s.* 6*d.* in the pound to the unsecured creditors.

"That having regard to the situation and nature of the assets affected by the scheme of arrangement, and to Chilian laws, I am of opinion the terms of the proposal are reasonable, and calculated to benefit the general body of creditors.

"The payments to be made by Mr. *Hodgkinson*, under the terms of his proposals, are, to the extent of 10,000*l.*, to be guaranteed by a policy of insurance on his life, and which has already been effected with the Scottish Amicable Life Insurance Society (Glasgow) for that sum, in the name of Mr. *David Smith*, the trustee, at half-yearly premiums of 141*l.* 5*s.* each, and which are to be repaid by Mr. *Hodgkinson*, before the policy is assigned to him for his own benefit, as it is intended it shall be when the whole of the said sum of 58,000*l.* and the interest thereon (if any) shall have been paid. The question, however, arises, whether this is a sufficient guarantee or not, but I am informed by Mr. *Garnett*, who conducted the negotiations with Mr. *Hodgkinson*, that no other security was available under the circumstances. But it is proposed to leave this question entirely with the Court."

At the various meetings of creditors no objection whatever was made to the scheme but on application to the County Court for its approval, opposition was raised for the first time by Messrs. *Isaac & Samuel*, of Manchester, creditors for about 7,000*l.*, for 4,000*l.* of which they contended that they held security in South America, objection being specially taken to the fact that the scheme in question involved a complete surrender of the foreign assets while

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there was no adequate security for the payment of the purchase-money: It was also alleged that the Chilian partners had failed to remit the proceeds of goods hypothecated to them as security for advances.

The County Court Judge refused to approve the scheme and from that refusal the trustee now appealed.

Sir Charles Russell, Q.C. (Henn Collins, Q.C., and Lawrence with him): for the trustee.

This scheme is not objected to by the Board of Trade; it is strongly supported by the report of the official receiver; and it was unanimously agreed to by the creditors. Even that creditor who now opposes did not do so at the meetings and it looks very much as if he now separates himself from the other creditors in the hope of being bought off. Mr. *Garnett* who was sent out to Chili to investigate matters took advice of the best Chilian lawyers, and the opinion is clear that it would be impossible to create any valid mortgage or charge on the South American assets in favour of the trustee. He came to the conclusion that no one could collect the debts except *Hodgkinson*, and that it would be much the best thing for the creditors if the proposed sale was effected. The creditors were driven to realise in a foreign country and if they did not accept that they would get practically nothing. The County Court Judge seems to have been misled by the imputation made on the Chilian house in the alleged failure by them to remit certain proceeds. The aim was of course to show that Mr. *Hodgkinson* was not a proper person to be intrusted as proposed by the scheme. But Mr. *Garnett* shows that the charge was absolutely untrue. The trustee and the committee formed of men of the highest commercial ability are quite satisfied and so are all the other creditors. They are persons well qualified to judge. There is no absolute rule as to security and here no better security can be available. Sub-section (6) of section 18 of the Bankruptcy Act, 1883, provides that "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors . . . the Court may, in its discretion, refuse to approve the composition or scheme." Here the scheme is reasonable and is clearly calculated to benefit the

creditors. Further I submit that there is no case where the Board of Trade have not opposed, where the official receiver has approved, and where the creditors have consented, that the Court has refused its approval (Counsel referred to *In re Wallace, Ex parte Campbell*, see *ante*, Vol. II., p. 167; L. R. 15 Q. B. D. 213; 54 L. J. Q. B. 382; 53 L. T. 208: *In re Reed, Bowen & Co., Ex parte Reed, Bowen & Co.*, see *ante*, Vol. III., p. 90; L. R. 17 Q. B. D. 244; 55 L. J. Q. B. 244; 34 W. R. 493: *In re Genese, Ex parte Kearsley & Co.*, see *ante*, Vol. III., p. 274; L. R. 18 Q. B. D. 168; 56 L. J. Q. B. 220; 56 L. T. 79).

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Bigham, Q.C. (*Sidney Woolf* with him): for Messrs. Isaac & Samuel.

The question simply is whether it is reasonable to hand over to one of these four insolvent debtors the whole of the assets on his unsecured promise to pay over 58,000*l.* by instalments lasting over four years. It is not reasonable and the proposal only requires to be stated to show that it is not reasonable. The Bankruptcy Court has a discretionary jurisdiction in proceedings of this kind. The judge is to examine into everything and on everything to exercise his discretion. This Court ought simply to see whether the Court below has gone so wrong that the discretion exercised ought to be overruled. It ought not to exercise a new discretion. The cases are altogether different where there is an appeal from discretion and where the Judge below is simply administering the law. In the former case it must be assumed that the judge is right and his decision ought not to be interfered with unless the discretion is most clearly wrong. Here the Judge was clearly right in saying that the scheme was an unreasonable one. There is no adequate security. The whole estate is handed over to one of the insolvent debtors upon his bare promise. How can it be a wise thing to transfer to a man like this assets worth 58,000*l.*? The only answer is the difficulty of realising the property and that nobody can do so but *Hodgkinson*. But surely Mr. *Garnett* or some other person might be sent over to sell and transmit the proceeds. Moreover the scheme is unfair to secured creditors from the absolute power over their securities with which it invests the trustee and committee of inspection to the exclusion of the Court.

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The County Court Judge proceeded on the ground that the handing over of the whole estate to one insolvent ought not to be allowed; and further that *Hodgkinson* was not a proper person to whom the estate ought to be handed over. He exercised his discretion and on the facts this Court ought not to interfere with it.

CAVE, J. :

Judgment.

I am of opinion that this appeal must be allowed. There is no doubt that the question whether a scheme of arrangement should be approved or not is a matter of discretion, and undoubtedly if I were satisfied that the Court below had decided on right principles I should not dissent because I might myself be disposed to place a little more strength on one point and a little less on another. But it would appear that it is not so in this case. The case is peculiar. The assets are nearly all abroad, in Chili, out of the jurisdiction of the Court. It is obvious that the collection of them by the trustee would be very expensive and would probably result in very small benefit to the creditors. Under those circumstances the proposal for a sale to Mr. *Hodgkinson* is made to a highly respectable committee of inspection who themselves hold more than half the debts due. They send out to South America another gentleman very capable and an expert, in order to make every investigation and in the result the committee have placed before them a scheme which they have thought it wise to accept. It is true that the matter depends first on the honesty, and next on the capability of *Hodgkinson*. But the committee of inspection fully understood that and they had good opportunity of judging the reliance to be placed on *Hodgkinson's* honesty and capability and they know the alternative. They came to the conclusion that the scheme should be accepted. A meeting of the creditors was called and no creditor opposed the scheme. Even the present respondents did not object and there was some evidence to shew that from a business point of view the scheme was as good as possible under the circumstances of the case. There was a second meeting and no one opposed the scheme. The present respondents were not there but they at any rate did not oppose it. Next it came before the County Court Judge for consideration and it seems to have come before him twice. It came before the Court with the report of the official receiver, and

the official receiver who has no interest and is an officer of the Board of Trade specially placed to watch the interests of the creditors, reported that in his opinion the proposal was reasonable and was calculated to benefit the general body of creditors. Now that added enormously to the provisions of the scheme. It was not opposed by the creditors and it was approved by the official receiver whose duty it was to report. Now at the first hearing the Judge remarked that there was no security for the scheme being carried out and that it depended entirely on the honesty and capability of Hodgkinson. It is argued that the Judge has complete discretion and that if the Judge says that no scheme involving a sale of assets difficult to collect ought to be sanctioned without security for the payment of the purchase-money this Court would be bound not to interfere. I cannot consent to that proposition. I think that no Judge ought to lay down a general doctrine of this kind to apply to all schemes. It is obviously a good thing to have security, but in this case there was nobody who could be expected to guarantee the scheme. A creditor certainly would not be expected to do so and there is even no suggestion that Hodgkinson had any wealthy friends who might come forward. But in any event if the County Court Judge had been of opinion that the want of security was fatal his proper course would be at once to refuse his approval. He did not do so. What he did was to adjourn that hearing and directed the scheme to be sent to the Board of Trade. The report of the official receiver, however, was not modified and the scheme came again before the Court. Nothing had taken place in the interval, but the present respondents came forward and opposed the scheme. That opposition was not founded on any affidavit, but it was suggested that Hodgkinson had been guilty of dishonesty in certain transactions with them and that he was not a fit and proper person to be intrusted as was proposed. I am surprised that the Judge would listen for one moment to such a suggestion unsupported by any evidence. There is no shadow of ground for the imputation on the honesty of Hodgkinson made in the affidavit which was read before us to-day and the notion of anyone imputing dishonesty to Hodgkinson on it is absurd. There is no imputation on him whatever. But the Judge appears to have attached some weight to it in this respect:—that the absence of

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security was a very unsatisfactory thing and when the charges against Hodgkinson were added to it, the scheme ought to be rejected. Now the want of security was obvious to everybody and notwithstanding that the creditors came to the conclusion that under the peculiar circumstances of this case the scheme was the best thing for them. In the case of *In re Aylmer, Ex parte Bischoffsheim* (see *ante*, Vol. IV., p. 152 ; L. R. 19 Q. B. D. 33 ; 56 L. J. Q. B. 460 ; 56 L. T. 801 ; 35 W. R. 532) it was obvious that the creditors accepted the scheme thinking that they would get advantages which they would not get. They were really placing themselves in a worse position. Here if Hodgkinson is an honest man the creditors get very great advantages and the creditors are the best judges of that. In my opinion the Court below did not proceed on right principles and we have a right to consider the matter, and looking at the wishes of the creditors and at the report of the official receiver this scheme does seem to me to be reasonable and calculated to benefit the general body of creditors. Whether Hodgkinson is honest and capable is a matter for the creditors and the official receiver and it is one which has been considered by them, and at any rate this Court has no grounds whatever for thinking that what the creditors and the official receiver have decided is wrong.

GRANTHAM, J.:

I am of the same opinion. In this case the County Court Judge appears to have acted on wrong principles. He seems to have thought that unless there was ample security he must refuse his approval. This case is especially one which shows that that is not so. It is certainly desirable that caution should be exercised in approving schemes of arrangement, but want of security is not of itself a sufficient reason for rejection. In my opinion a scheme such as this, approved as it is by such a committee, and sanctioned by the Board of Trade, ought not to be rejected without some very adequate reason. The appeal must therefore be allowed.

Appeal allowed with costs.

Solicitors : *Davidson & Morriss*, for the appellants.

H. Montagu, for the respondent.

PRACTICE.

IN RE SCHARRER, Ex PARTE TILLY.

*Bankruptcy Act, 1883, section 27.**Examination of Witness—Refusal to Answer Questions—Appeal.*

Held: (1.) That where on examination before the Registrar under section 27 of the Bankruptcy Act, 1883, a witness objects to answer questions put to him, such witness cannot be made a respondent to an appeal against the decision of the Registrar refusing to order the witness to answer the said questions.

(2.) That although the answer of a witness summoned for examination under section 27 of the Bankruptcy Act, 1883, must in the end be accepted in so far that witnesses cannot be called to contradict him; yet the Court is not bound at once to accept the first answer as conclusive, but the witness may be further questioned in order to test his credibility.

The case of *Ex parte Rooke*, *In re Purvis* (56 L. T. 579) explained.

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THIS was an appeal on behalf of the trustee in the bankruptcy of *Eugene Sharrer* from a decision of Mr. Registrar Linklater refusing to direct one *F. T. Eggers*, a witness, to submit himself for examination as to dealings with property of the bankrupt under section 27 of the Bankruptcy Act, 1883.

At the examination before the registrar the witness answered questions put to him relating to certain property belonging solely to the bankrupt, but on being required to state the names and addresses of the persons for whom he proceeded to Zanzibar to collect property alleged to be there, and also as to his dealings with the property of *Scharrer, Tiede & Co.* trading in Africa, of which firm the bankrupt was a partner, he refused to do so on the ground that the property was never the property of *Scharrer & Co.*, but was the property of *Scharrer, Tiede & Co.* of Zanzibar, and that he was only summoned to answer questions as to dealings with the property of *Scharrer & Co.*, London.

The learned registrar refused to direct the witness to answer the questions, holding that the witness was not bound to give any information as to any dealings except with the bankrupt, the two

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firms being really distinct. The trustee in the bankruptcy now appealed, the notice of appeal asking for an order directing *F. T. Eggers* "to submit himself for examination touching his dealings with the property belonging to or in the possession of the bankrupt or belonging to or in the possession of *Scharrer, Tiede & Co.*" The notice was served only on the witness *F. T. Eggers*.

E. Cooper Willis, Q.C. (Yelverton with him) : for the trustee.

The witness refused to answer the questions and his refusal was supported by the registrar.

[FRY, L.J.—But as a matter of fact you are asking us to make an order to direct a witness to answer on oath questions which the Court does not think should be put. You are not asking us to direct the registrar. Can that be right in form?]

[LOPES, L.J.—I cannot myself see what the witness has done wrong. He has merely obeyed the registrar. He took an objection and the registrar supported him. You have made the witness a respondent, and it does seem very hard under the circumstances that he should be made a party to an application of this kind.]

The registrar cannot be made respondent. The witness is properly a respondent, if one is necessary. If not the Court can treat this motion as an *ex parte* application. The registrar was influenced by the case of *Ex parte Rooke, In re Purvis* (56 L. T. 579). He said that if he did not feel himself bound by that case he should allow the questions to be put. There Mr. Justice CAVE is reported to have held that the answer of the witness must be accepted, as the object of section 27 was not to enable a trustee by cross-examination to make out a case. But the very object of the section is to enable the trustee to force information out of an unwilling witness; and a witness cannot escape from answering by merely alleging that the property is not the property of the bankrupt.

The witness, *F. T. Eggers*, appeared in person but was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER):

It seems to me impossible that this appeal as it now stands can succeed. The appeal asks for an order against the witness. The form in which the appeal runs is that he should answer certain questions. If that order were made and he refused to answer, I suppose an attachment might be asked for. But what are the facts. The witness was asked certain questions and he objected to answer them. It was put to the registrar whether he would order him to answer, and the registrar said that he would not. The witness has not refused to answer what he was told he must answer. He refused to answer what the registrar said he need not. Under these circumstances the witness ought not to be made a respondent. It is impossible that we can make any order against the respondent at all, and the appeal must therefore be dismissed. But something has been said as to the difficulty in which the registrars feel they have been placed by reason of the decision in *Ex parte Rooke, In re Purvis* (56 L. T. 579). It is said that according to that case Mr. Justice CAVE meant to hold that when a witness is called the registrar is bound to accept the first answer he gives. That if a witness says he knows nothing about the matter the registrar is bound to take that first answer, and that the witness cannot be asked any question as to his credit. In fact that there could be no testing of the witness to see whether he would stand by his answer. Now I have spoken to Mr. Justice CAVE a few minutes ago, and he is perfectly astonished that anybody could suppose that he intended to say any such thing. What he said was, not that the first answer must be taken, but that in the end the answers of the witness must be taken—that is witnesses could not be called to contradict him; but the witness may be cross-examined. In that construction the case certainly does not present the difficulties which the registrars appear to have adopted on it. I do not desire to put any particular construction on section 27. We have not received assistance from counsel on the other side. It is not necessary for us in this case to put any construction on the section and I think we had better not do so. But I have been authorised to make that explanation with regard to *Ex parte Rooke, In re Purvis* (56 L. T. 579) with which I entirely agree. We must dismiss the appeal but without prejudice to any application to the registrar for Mr. Eggers to be further examined.

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Judgment.

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FRY, L.J. :

The power incorporated in section 27 of the Bankruptcy Act, 1883, has been in force for some centuries. Under the section the Court has power to examine a witness concerning the debtor, his dealings or property. The power of examination is vested in the Court. The person called is not in the ordinary position of a witness called by a litigant party. He is the witness of the Court. The conduct of the examination really rests with the Court, although for convenience the questions are put by counsel and others. There can be no doubt that the power of examination is not meant to be a mere formal one, but is given to enable the Court to examine the witness usefully and fruitfully. I intend to say nothing to determine the extent to which that may go: but what is to be aimed at is a real bringing out of the true facts of the case. But in this case the registrar refused to allow certain questions to be put; *i.e.* he has refused to put the questions. The witness has only obeyed the directions of the Court. Therefore we have an appeal asking for an order to direct the witness to state on oath that which the registrar said he need not state. In my opinion that is altogether irregular, and I decline to depart from the terms of the application. Without suggesting that the registrar is in any way fettered in respect of any reconsideration of the matter, in my opinion the appeal must be dismissed.

LOPES, L.J. :

I am of the same opinion. I could not agree with the case of *Ex parte Rooke, In re Purvis* (56 L. T. 579) when it was cited or as it is reported. But now it has been explained, and as explained I entirely agree with it. I should myself be sorry to see a limited construction put on section 27 of the Bankruptcy Act, 1883, which I think to be a most valuable section. If the registrar felt himself fettered by *Ex parte Rooke, In re Purvis* (56 L. T. 579), he is now relieved from that difficulty.

Appeal dismissed.

Solicitor: *Clarence Harcourt*, for the trustee in the bankruptcy.

IN RE SUFFIELD & WATT, EX PARTE WIGGINS.

COURT OF
APPEAL.*Bankruptcy Act, 1883, section 102.*BEFORE
THE MASTER
OF THE ROLLS,
FRY, L. J.,
LOPES, L. J.
1888.*Solicitor's Lien for Costs—Partnership Action—Bankruptcy—Transfer to Bankruptcy Court—Charge on Property Recovered or Preserved—Claim of Landlord for Rent—Priority—Solicitors' Act, 1860 (23 & 24 Vict. c. 127), section 28.*

March 2nd.

On April 6th, 1887, an order was made directing the receiver appointed in a partnership action in the Chancery Division which had been transferred to the Bankruptcy Court, to pay over the balance of moneys in his hands to the solicitor in the action in respect of his taxed costs.

On January 11th, 1888, the Court on an application by the receiver for directions in view of a claim made by the landlord of premises occupied by the bankrupts for rent, varied its order of April 6th to the extent that the amount due to the landlord should be paid to him, and the remainder to the solicitor.

The moneys in the receiver's hands were not sufficient to pay the solicitor in full, and a claim to priority over the landlord was made by him.

Held: (1.) That the order of April 6th, 1887, being made by the Judge sitting as a Judge of the High Court and not in Bankruptcy, that order could not be reheard by him and varied.

(2.) That under section 28 of the Solicitors' Act, 1860, the solicitor's charge was entitled to priority over everything except the claim of a *bond fide* purchaser for value without notice; and that as the landlord did not fill that character, the solicitor was entitled to priority over him.

THIS was an appeal from an order of Mr. Justice CAVE directing the receiver appointed in an action for dissolution of partnership which had been transferred to the Bankruptcy Court, to hand over to the solicitor in the said action the balance of moneys in his hands after deducting therefrom and paying to the landlord of premises occupied by the bankrupts a claim made by him for rent.

In the year 1886 an action for dissolution of partnership was commenced by the debtors in the Chancery Division of the High Court, in which one *Bradshaw Brown* was appointed receiver.

Both the partners having become bankrupt this action was subsequently transferred to the Bankruptcy Court, and on April 6th 1887 an order was made by Mr. Justice CAVE, staying the action; and the receiver was directed to pass his accounts and to

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pay over certain moneys in his hands to Mr. *Wiggins* the solicitor in the partnership action in respect of his costs.

On this occasion when the above order was made the attention of the Court was not called to the fact that on March 19th 1887 a claim had been made upon the receiver by the landlord of premises occupied by the bankrupts for rent. This claim of the landlord amounted to 49*l.* The amount in the hands of the receiver was 84*l.* And the taxed costs of the solicitor were over 100*l.* :

On January 11th 1888, the order of April 6th 1887 not having been complied with, the receiver, in view of the landlord's claim, applied to the Bankruptcy Court for directions, when Mr. Justice CAVE after argument modified his said order of April 6th to the extent that the receiver should pay the 49*l.* to the landlord and that the balance should be handed to the solicitor.

From that order the solicitor now appealed.

Dundas Gardiner : for the solicitor.

The landlord was in no better position than any other creditor of the firm. In *Bailey v. Birchall* (2 Hemming & Miller 371) it was held that "A solicitor is entitled under 23 & 24 Vict. c. 127, to a charge upon property recovered or preserved, for his costs of the litigation by which it is recovered or preserved, irrespective of his client's interest in the property, and although it turns out that the latter has not and never had any interest therein." This is in the nature of salvage and is superior to every claim. There was not beneficial occupation on the part of the receiver. The solicitor's charge is a paramount claim. In *Dallow v. Garrold* (L. R. 14 Q. B. D. 543 ; 53 L. J. Q. B. 527 ; 33 W. R. 123) "The proceeds of a *fi. fa.* issued on behalf of the successful plaintiff in an action, were attached in the hands of the sheriff by a garnishee summons from a County Court to answer a judgment obtained against the plaintiff in that Court. The plaintiff's solicitor in the action, who had received notice of the service of the garnishee summons, subsequently obtained an order under 23 & 24 Vict. c. 127, s. 28 charging the fund recovered with costs of the action remaining due to him. It was held, that such order was rightly made, and the solicitor's claim was entitled to priority over the claim of the judgment

creditor of the plaintiff under the garnishee summons." And in *Shippey v. Grey* (49 L. J. Q. B. 524; 42 L. T. 673; 28 W. R. 877), "The plaintiffs were the solicitors for W. in an action in which he recovered a sum of money. The defendant was a judgment creditor of W., and obtained *ex parte* on the day that judgment was signed in the above action, a garnishee order attaching all debts due to W. On the taxation of costs on the same day the plaintiffs for the first time learned of the defendant's claim, and then gave notice to the defendant in the action in which W. was plaintiff, of their claim of lien, and within five days applied for an order declaring that they were entitled to a charge on the money recovered by W. It was held that the plaintiffs had a lien for their costs on the sum recovered by W.; that they were entitled to the order sought for; and that a garnishee order obtained by the defendant did not take priority over that lien." The judges have held that this charge is in the nature of salvage and therefore attaches upon the thing saved.

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F. C. Willis : for the landlord.

Under section 104 of the Bankruptcy Act 1883 Mr. Justice CAVE had power to vary the order of April 6th, and he modified it in order that the just claims of the landlord might be secured.

THE MASTER OF THE ROLLS (LORD ESHER) :

In this case it is not denied that the solicitor had preserved Judgment property, and therefore if there was nothing in his way he was entitled to a charging order under the Solicitors Act on that fund. That is the only Act under which a charging order could be made. A charging order was made by Mr. Justice CAVE in the Court in which he exercises jurisdiction under the Bankruptcy Act, but sitting there, he being a Judge of the High Court has jurisdiction to exercise other powers of the High Court, and amongst those powers to exercise jurisdiction in respect of the Solicitors Act. That being so on April 6th 1887 an application was made by the solicitor for a charge in his favour under the Solicitors Act. The application was to exercise the jurisdiction under the Solicitors Act as a Judge of the High Court, and Mr. Justice CAVE did so. Then he could not alter that order. It was not an order under the Bank-

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ruptcy Act. It was an order under the jurisdiction of the High Court and the Solicitors Act, and the Judge could not rehear it even if an application to rehear had been made to him. But as a matter of fact no application was made to rehear. That being so while that order of April 6th stands good and impossible to be re-opened, the receiver in the suit asks for directions as to money in his hands. The difficulty was whether rent due to the landlord but not yet paid should or should not have priority over the charge which had been made and was existing in favour of the solicitor. Now it seems to me that there are a succession of cases which decide that so long as the money has not been paid over to anyone the charging order has effect unless there is a *bonâ fide* purchaser for value without notice. In *Dallow v. Garrold* (L. R. 14 Q. B. D. 548; 53 L. J. Q. B. 257; 33 W. R. 128) it was held that that was the effect. In that case I said "It is enacted by section 28 that 'all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right.' The garnishee summons is an act which 'operates to defeat the charging order'; it is therefore *primâ facie* void unless it is 'made to a bonâ fide purchaser for value without notice.' It has in effect been argued that any person who bonâ fide issues a garnishee summons is a purchaser without notice. I really think that the statute means what it says: it means a person who has actually purchased without notice 'the property preserved or recovered,' and who has paid in money the price for it." The landlord has not done that. That case is a decision of the Court of Appeal that a charging order under the Solicitors Act has priority over everybody except a purchaser. But that case is not alone. The principle of the decision was before approved in *Shippey v. Grey* (49 L. J. Q. B. 524; 42 L. T. 673; 28 W. R. 877) which was to precisely the same conclusion. Upon authority and principle it seems obvious that this charging order had priority over the claim for rent by the landlord, which he had not enforced by means of a distress. But it was said that the order was made in bankruptcy and that under section 104 of the Bankruptcy Act 1883 the learned Judge had jurisdiction to rehear. I have disposed of that before; This order was

not made in bankruptcy, and section 104 only gives power to the Court to vary "any order made by it under its bankruptcy jurisdiction." This order is not so.

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FRY, L.J.:

I entirely agree. Was it competent to Mr. Justice CAVE to rehear and vary the order of April 6th? I conceive that it was not competent. In the case of *In re St. Nazaire Company* (L. R. 12 Ch. Div. 88; 41 L. T. 110; 27 W. R. 854) it was laid down that "Under the system of procedure established by the Judicature Acts no Judge of the High Court has any jurisdiction to rehear an order, whether made by himself or by any other Judge, the power to rehear being part of the appellate jurisdiction which is transferred by the Acts to the Court of Appeal." When perfected the jurisdiction of the Judge of the High Court who has pronounced the order has come to an end. This order being pronounced not under the Bankruptcy Act but under the Solicitors Act there was no power to rehear it, and as a matter of fact there was no application to rehear. Now in the matter of substance is the order giving the landlord a priority over the solicitor right? It is said that he may have priority by reason of his right of distress but that cannot give it to him. In my view the matter is made plain by the words of the statute itself. A charge when made is before everything but a *bonâ fide* purchaser for value without notice. That view is also confirmed by the line of decisions which have been referred to, and they are all authorities which illustrate the plain language of the statute. If the fact of the landlord having made the claim had been brought to the notice of Mr. Justice CAVE on April 6th it would have been no valid reason for his declining to make the order.

LOPES, L.J.:

I am of opinion that Mr. Justice CAVE had no jurisdiction to rehear the order of April 6th. There is no jurisdiction to rehear when an order has been drawn up and perfected. But Mr. Justice CAVE was never asked to rehear, and he did not in point of fact do so. The order of April 6th was subsisting and binding. What does it bind? The authorities and the Act are clear. It binds all

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moneys in the jurisdiction of the Court where the order is made and that against everybody except a *bonâ fide* purchaser for value. The landlord cannot be said to be that and this appeal must be allowed.

Appeal allowed.

Solicitors : *T. J. Pullen & Co.*, for the solicitor.
Jennings & Sons, for the landlord.

Cases relied upon or referred to :—

Bailey v. Birchall, 2 Hemming & Miller, 371.

Dallow v. Garrold, L. R. 14 Q. B. D. 543 ; 53 L. J. Q. B. 527 ; 33 W. R. 123.

Shippey v. Grey, 49 L. J. Q. B. 524 ; 42 L. T. 673 ; 28 W. R. 877.

In re St. Nazaire Company, L. R. 12 Ch. Div. 88 ; 41 L. T. 110 ; 27 W. R. 854.

PRACTICE.

IN RE CONNAN, EX PARTE CONNAN.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g).**Bankruptcy Notice—"Final Judgment"—Stay of Execution—Garnishee order absolute by creditor of judgment creditor—Rules of the Supreme Court 1883. Order XLII. Rules 22, 23.*COURT OF
APPEAL.BEFORE THE
MASTER OF
THE ROLLS,
FRY, L.J.,
LOPES, L.J.
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Held: That where a garnishee order absolute has been served upon a judgment debtor by a creditor of the judgment creditor attaching the debt due from such debtor, even though the debt in respect of which the garnishee order was obtained is in fact subsequently paid by the judgment creditor, such judgment creditor is not entitled to serve a bankruptcy notice under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, upon the judgment debtor in respect of his debt, unless the garnishee order has been discharged or until leave has been given to him to issue execution under Rule 23 of Order XLII. of the Rules of the Supreme Court, 1883.

THIS was an appeal on behalf of the debtor *Connan* from a receiving order made against him by Mr. Registrar Giffard.

The case raised the question whether a creditor who had obtained a final judgment against his debtor, was entitled to serve a bankruptcy notice on such debtor during the subsistence of a garnishee order absolute, which a judgment creditor of the original judgment creditor had served on the original judgment debtor, the debt in respect of which the garnishee order was obtained having in fact been satisfied, although the garnishee order had not been discharged.

Section 4 sub-section (1) of the Bankruptcy Act 1883 provides:—"A debtor commits an act of bankruptcy in each of the following cases:—(g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor

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or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

And by Order XLII. Rule 22 of the Rules of the Supreme Court 1883, "As between the original parties to a judgment or order execution may issue at any time within six years from the recovery of the judgment or the date of the order."—By Rule 23 "In the following cases, viz. (a) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution:—the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that an issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise as shall be just."

On January 28th, 1887, a final judgment was obtained against the debtor *Connan* by one *Hyde* for 70*l.* 9*s.* 8*d.*

This judgment was not satisfied, and on July 27th, 1887, one *Making*, a judgment creditor of *Hyde* for 100*l.*, served on *Connan* a garnishee order *nisi* attaching the judgment debt of 70*l.* 9*s.* 8*d.* due from him to *Hyde*.

On August 4th, 1887, the garnishee order was made absolute, directing *Connan* forthwith to pay the 70*l.* 9*s.* 8*d.* to *Making*, or in default giving leave to issue execution for the said sum.

Connan did not pay any part of the judgment debt, and on December 15th, 1887, a bankruptcy notice under section 4, sub-section 1 (g) was served upon him by *Hyde* in respect of the debt; and at the same time a letter was sent by *Hyde's* solicitors to *Connan* informing him that the garnishee order had been discharged by payment; and that, therefore, the amount of the judgment debt was properly payable to *Hyde*.

The garnishee order, however, had not been discharged by any order of the Court.

No payment having been made by *Connan* in accordance with the terms of the bankruptcy notice, a petition was presented against him by *Hyde*, on the hearing of which evidence was brought forward which satisfied the registrar that before the bankruptcy notice was served, *Hyde* had paid the debt due from him to *Making*, and he thereupon made a receiving order.

From that order the debtor *Connan* now appealed.

Stephen Lynch (Watt with him): for the debtor *Connan*.

Hyde had not a debt on which he could issue execution when the bankruptcy notice was served. No evidence whatever was furnished of the truth of the statement that *Making's* debt had been paid, and the garnishee order was in fact still subsisting, it not having been discharged by any order of the Court. Before execution could be issued the garnishee order ought to be discharged, or leave to issue execution under the Supreme Court Rules must have been given. On August 4th there was a change in the parties entitled to issue execution. In *In re Ide, Ex parte Ide* (see *ante*, Vol. III. p. 289: L. R. 17 Q. B. D. 755: 55 L. J. Q. B. 484: 35 W. R. 20) it was held that "A creditor who has obtained a final judgment cannot under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, issue a bankruptcy notice against the judgment debtor, unless such creditor is also in a position to issue immediate execution on the judgment. Thus, where final judgment is obtained against a firm, a bankruptcy notice cannot be issued against a member of such firm who has not been served with the writ, and has not appeared, or admitted that he is or has been adjudged to be a partner, unless under Order XLII., Rule 10, of

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the Rules of the Supreme Court, 1883, leave to issue execution against such partner has been obtained."

Herbert Reed : for the judgment creditor.

There is no provision in the Rules for discharging a garnishee order like this. *Hyde* was entitled to issue the bankruptcy notice and to issue execution notwithstanding the order had been made. Section 4 sub-section 1 (g) does not mean "that there never shall have been a stay." The meaning is "on which execution is not stayed"—that is, is stayed at the time of service. *Connan* could have paid the person who obtained the garnishee order and he did not do so. *Hyde* did so and told *Connan*. If *Connan* had any doubt he might have made enquiries. It cannot be intended that a garnishee order obtained should bind the debt for all time. Rule 23 of the Rules of the Supreme Court must be read subject to Rule 22.

March 22nd.

Judgment.

THE MASTER OF THE ROLLS (LORD ESHER) concurred in the judgment of the Lords Justices.

FRY, L.J. :

In this case the appeal must be allowed and the receiving order made by the registrar must be discharged. The garnishee order absolute gave to *Making* the right to issue execution upon the judgment against *Connan*. It operated as a stay of the right to issue execution so far as *Hyde* was concerned. Now that order has not been discharged. It may be that *Hyde* may have had a right to procure the discharge of it. But, if he had the right, it was his duty either to apply to the Court under Rule 23 of Order XLII. of the Rules of the Supreme Court 1883 for leave to issue execution upon his judgment, if that rule applies to such a case. Or it was his duty to apply to the Court under its general jurisdiction to discharge the garnishee order. He took neither of these courses. As a matter of fact during the whole of the seven days the bankruptcy notice was pending, *Making* might have issued execution against *Connan*, who would have had no answer to it. Moreover *Connan* could safely have paid the judgment debt to *Making*. So

far as Hyde was concerned at the time when the bankruptcy notice was served execution was stayed upon the final judgment. He was therefore not entitled under section 4 sub-section 1 (g) of the Bankruptcy Act 1888 to serve the notice, and the receiving order founded upon it must be set aside.

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LOPES, L.J. :

In my opinion the garnishee order operated as a stay of execution, and during its pendency execution could not be issued. The proper course for the judgment creditor was to have taken some means to call upon the judgment debtor to show cause why the order should not be discharged. The present case therefore does not come within section 4 sub-section 1 (g) of the Bankruptcy Act 1888 and the decision of the registrar must be reversed.

Appeal allowed with costs.

Solicitors : *G. Johnson*, for the debtor.

F. A. Foster & Co., for the execution creditor.

Case relied upon :—

In re Ide, Ex parte Ide, see *ante*, Vol. III., p. 239 : L. R.
17 Q. B. D. 755 : 55 L. J. Q. B. 484 : 35 W. R. 20.



PRACTICE.

COURT OF APPEAL. IN RE COLIN CAMPBELL, EX PARTE COLIN CAMPBELL.

BEFORE THE
MASTER OF
THE ROLLS,
FRY, L.J.,
LOPES, L.J.
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Bankruptcy Act, 1883, section 32.

Disqualifications of Bankrupt—Refusal of Certificate to Remove—Bankruptcy not caused “by Misfortune”—Commencement and Prosecution of Divorce Proceedings.

March 2nd
and 3rd.

Although section 32 of the Bankruptcy Act 1883—by which on being adjudged bankrupt a debtor is disqualified from holding any office of public trust therein specified—is to be construed strictly, yet there is no right to construe the words of the said section otherwise than in their ordinary meaning; and where the bankruptcy is not the result solely of some accident over which or over the direct conducting causes of which the bankrupt has no control it cannot be said to be caused “by misfortune” within the meaning of sub-section 2 (b) of the said section.

Thus where a debtor attributed his bankruptcy to the fact that he had commenced a suit in the Divorce Court against his wife for a divorce on the ground of her adultery, and his petition was dismissed in consequence of which he was ordered to pay the costs of the wife and of four correspondents.

Held: That the commencement and prosecution of the divorce proceedings were entirely under the control of the bankrupt: that it could not therefore be said that the bankruptcy had been caused “by misfortune”: and that the Registrar was right in refusing to grant to the bankrupt a certificate for the removal of disqualifications under the section.

THIS was an appeal on behalf of the bankrupt, commonly known as *Lord Colin Campbell*, from an order of Mr. Registrar Giffard, refusing to grant a certificate for the removal of disqualifications under section 32 of the Bankruptcy Act 1883.

Section 32 provides:—“(1) Where the debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for—(a) Sitting or voting in the House of Lords, or on any committee thereof, or being elected as a peer of Scotland or Ireland to sit and vote in the House of Lords; (b) Being elected to, or sitting or voting in, the House of Commons or on any committee thereof; (c) Being appointed or acting as justice of the peace; (d) Being elected to or holding or exercising the office of mayor, alderman, or

councillor; (e) Being elected to or holding or exercising the office of guardian of the poor, overseer of the poor, member of a sanitary authority, or member of a school board, highway board, burial board or select vestry.

“(2) The disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when,—(a) The adjudication of bankruptcy against him is annulled; or, (b) he obtains from the Court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part. The Court may grant or withhold such certificate as it thinks fit, but any refusal of such certificate shall be subject to appeal.

“(3) The disqualifications imposed by this section shall extend to all parts of the United Kingdom.”

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On May 23rd 1887 a receiving order was made against the debtor upon the petition of the Duke of Marlborough, a creditor for 971*l.*, due to him in respect of his taxed costs in the Divorce Suit of “Campbell *v.* Campbell and others.”

On May 28th 1887 the debtor was adjudicated bankrupt and on June 18th he filed his statement of affairs in which the unsecured liabilities were returned at 8622*l.* 6*s.* 8*d.*: the available assets amounting to about 144*l.*

The bankrupt attributed his failure entirely to the result of the proceedings which had taken place between Lady Colin Campbell and himself in the Divorce Court, and to the costs thereby incurred, which, including the costs of his own solicitors, amounted to something like 4949*l.*

On December 21st 1887 the bankrupt obtained an unconditional order of discharge under section 28 of the Bankruptcy Act 1883.

But on January 24th 1888 application made by him for a certificate for the removal of disqualifications under section 92 subsection (2) was refused by the registrar.

On that occasion it was urged on behalf of the bankrupt that the divorce petition was presented by him on November 7th 1884, under the advice of eminent counsel, and a written opinion that he

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would be quite justified, on the facts stated, in taking proceedings for a dissolution of his marriage. That pending the suit, he paid sums amounting to about 300*l.* in respect of debts incurred by Lady Colin Campbell; that he had been put to considerable expense in other ways, and had also paid permanent alimony under orders made in the Divorce Division since the petition was presented to the amount of 350*l.* and upwards.

Mr. Registrar Giffard in refusing the application said:—"By the words of section 32, in order to entitle the bankrupt to the certificate, the bankruptcy must have been caused by 'misfortune' without any 'misconduct' on his part. The language was not very clear, but he supposed that some meaning must be attached to each phrase. The 'misconduct' spoken of in section 32 was not identical with that mentioned in section 28, otherwise every bankrupt who obtained a free discharge might be entitled to apply for a certificate under section 32. It was true that Lord Colin Campbell had not committed any offence within section 28, yet there were features in his conduct which bore a strong resemblance to the misconduct specified in that section. The temptation to institute such an action might have been very strong, and, as had been said, the bankrupt acted throughout under the advice of eminent counsel; but could the Court go so far as to say that he was justified in carrying on such a suit, unless he was able to pay the costs if unsuccessful? How then could it be said that the bankruptcy was caused by misfortune? Misfortune was the result of something which was quite unforeseen, and against which the bankrupt could not be expected to provide, but in this case he must have known that if he failed in these proceedings he would have to pay the costs. Under these circumstances he must decline to grant the certificate."

From this decision the bankrupt now appealed.

Finlay, Q.C. (Herbert Reed with him) : for the bankrupt.

The registrar appears to have been of opinion that no man had a right to take proceedings in the Divorce Court unless he had the means of paying the costs of the co-respondents if he failed. But Lord Colin Campbell had ample grounds for bringing the suit. On

November 6th 1884 Lady Colin Campbell filed a divorce petition against her husband. On November 7th 1884 Lord Colin Campbell filed his petition against his wife charging adultery with three co-respondents. In April 1885 a fourth co-respondent was added. In June 1886 the two suits were consolidated. The trial commenced on November 26th 1886 and lasted until December 21st 1886, and resulted in a verdict being given for the defendants in both actions. On the facts the bankrupt is clearly entitled to the certificate. The proceedings were taken first by the wife in point of date, and it could not be said that Lord Colin Campbell was not entitled to defend those proceedings. Then he believed that he had good grounds for cross-proceedings. He laid the facts before counsel who support his view. The proceedings however fail, and he must submit to the verdict of the jury, but it is very hard if a man *bond fide* takes such proceedings, because the jury take a merciful view of the conduct of the wife, that he should be told that because he cannot pay a large bill for costs his bankruptcy is due to misconduct on his part.

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[THE MASTER OF THE ROLLS.—Supposing it to be as reasonable a suit as could be, Is it misfortune within the meaning of section 32?]

What could a husband under such circumstances do? There are perhaps cases in which forgiveness might be granted; but when the wife had taken proceedings as in this case forgiveness could not be extended. Where a husband believes that his wife is unfaithful and the circumstances preclude forgiveness it is a "misfortune" that he should be forced into these proceedings in the Divorce Court, and the adverse result is not due to the fact that he had not reasonable grounds to take the proceedings. Lord Colin Campbell could not possibly have foreseen that the expenses would be so heavy. The only case yet decided on section 32 is that of *In re Burgess, Ex parte Burgess* (see *ante*, Vol. IV. p. 186). There it was held that the words "misfortune without any misconduct" in section 32 subsection 2 (b) of the Bankruptcy Act 1883 mean "pure misfortune as distinguished from and without misconduct." If there is no "misconduct" under this section there must be

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"misfortune," and here it certainly cannot be said that there was any misconduct on the bankrupt's part.

Sidney Woolf: for opposing creditors made certain statements as to the financial position of the bankrupt but was not required to proceed.

March 8rd.

THE MASTER OF THE ROLLS (LORD ESHER) :

Judgment.

Our first duty is without regard to the present case to come as far as may be necessary to the true construction of section 32 of the Bankruptcy Act 1883. It is not an easy section to construe, and we cannot in my opinion do so satisfactorily without considering section 28, although I do not think the two sections are connected with each other. Still when you look at section 28 there are causes of a bankruptcy put in, which if they have caused the bankruptcy, prevent a bankrupt getting a discharge at all. Those causes are mainly—though not entirely—improper trade dealings. Mainly, but not exclusively so, and some would prevent a non-trader getting his discharge at all. Then we come to section 32. If any such misconduct as is mentioned in section 28 has caused the bankruptcy, section 32 cannot come in at all. The discharge would be refused under section 28. But section 32 deals with a case where there is a discharge. Therefore it deals with a case where the special cases of misconduct in section 28 do not exist. Yet section 32 is a highly penal section. Serious disabilities are imposed by it and it is highly penal. It must, therefore, in my opinion be construed strictly. But that does not entitle one to throw aside the plain words of the section. The section enacts that "Where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act be disqualified for"—and then follow the disqualifications. On the mere fact of bankruptcy the disabilities attach. But it is further enacted that "The disqualifications to which a bankrupt is subject under this section shall be removed and cease, if and when:—(1) the adjudication of bankruptcy against him is annulled; or (2) he obtains from the Court his discharge with a certificate to the effect that his bank-

ruptcy was caused by misfortune without any misconduct on his part." The certificate which is given is to remove the disqualifications which *prima facie* attach from the mere fact of his having become bankrupt. Now I admit that that section is, as I have said, to be construed strictly. But there is no right to give no meaning to some of the words—to give effect to some words and to strike others out, or to construe them otherwise than in the ordinary meaning of the words. Therefore there is no right to strike out the words "by misfortune" and only read the section as if the words were "that his bankruptcy was caused without any misconduct on his part." Mr. Finlay argued that if there was no misconduct under this section there must be misfortune. Therefore he reads simply that "the bankruptcy was caused without any misconduct," and he strikes out the words "by misfortune." After the most careful consideration I do not think we are entitled to strike out the words "by misfortune." We must give some meaning to them. It is impossible in our opinion to give an exhaustive definition of the words in the view of the many cases which must come before the Court. Many definitions have been put forward during the argument, some by this Court itself in our endeavour to come to a right conclusion in this case, but there has been no suggestion from the Court that it is bound by any of them. There are a hundred sets of circumstances where the case could arise and it is impossible to define "by misfortune" exhaustively. But in my own opinion it can be defined better in the negative than in the affirmative. Where the bankruptcy is not the result solely of some accident over which or over the direct conducting causes of which the bankrupt has no control it is not misfortune. If the bankruptcy is not the result of such an accident you have not got it within the word "misfortune." Now let us consider this case. What was the accident which caused this bankruptcy? In truth it was the adverse verdict of the jury. Then I say in the strongest way I can that in a Court of law and justice a verdict given by a jury must be assumed to be a right one, I will not listen for one moment to a suggestion that the verdict was a wrong verdict. Therefore you have a right verdict. What was the conducting cause of the right verdict. It was the bringing of the action and producing the evidence by which the action was sup-

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ported. Was the bringing of the action a cause over which Lord Colin Campbell had no control? Clearly not. Was the producing the evidence a cause over which he had no control? Most certainly not. What was done was by his direction. Therefore it was under his control. Although it might be done under the advice of counsel, he could withdraw, though I do not say that would have been a wise thing to do. Therefore the accident of the verdict is the direct result of causes over which Lord Colin Campbell had control. The direct cause which conduced to the accident—if it can be called one—viz. the adverse verdict, are things under the control of the plaintiff in such a case as this. Without saying that there was any misconduct—and I wish my judgment to be quite clear on this point—without entering upon the question whether it was too rash to enter upon this action without having the means to pay the costs, a question which would require most careful consideration, I think that this appeal fails on the ground that the appellant has not shown that he has brought himself within the first part of the section, that his bankruptcy was caused “by misfortune.”

FRY, L.J. :

By section 82 of the Bankruptcy Act 1883 a bankrupt is placed under disabilities in respect of every office of public trust, extending as it seems from membership of the House of Lords or Commons down to that of a select vestry. The meaning and intention of the section seems to be that if the bankrupt had not been able to carry on his own business successfully, how could he carry on the business of other people? That appears to be the intention of the section. But then come the provisoes—“The disqualifications to which a bankrupt is subject under this section, shall be removed and cease if and when :—(1) The adjudication of bankruptcy against him is annulled; or (2) he obtains from the Court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part.” That enactment throws the burden of proving his case *prima facie* on the bankrupt and the power given to the Court is a discretionary power. What the legislature had in view appears to be this—that there are circumstances in which a man could become bankrupt without any

presumption being raised that he is not fit to discharge public offices and public trusts. Mr. Finlay seems to have argued that that is not so because the disqualifications are removed when the bankruptcy is annulled. But the legislature may have considered that if a man is able to pay his debts in full, he has shown such good conduct that he has earned for himself the capacity of fulfilling a public office again. That seems to be the general scope of the section. Now let me try to give an example. If a man lost the whole of his fortune by an act of God it would be by misfortune without any misconduct on his part. Take the case of Job. He was subject to four totally unexpected events:—an irruption of the Sabæans—a fire from heaven—an attack of the Chaldeans—and a wind from the wilderness. The fact of losing his wealth was no imputation on his character or his capacity. But on the other hand if a man loses his fortune by gambling on the Stock Exchange, although he may be—and often is—said to be ‘unfortunate,’ it is not misfortune under the Act. Now I shall not attempt to give any definition of “misfortune” or of “misconduct,” but we must make some steps towards it. It seems to me, for the purposes of this case, misfortune must be an adverse event not depending on the will of him who suffers from it, and of such a character that a prudent man would not take it into his calculation in carrying on his own affairs or those of other people. It was strongly pressed on us by Mr. Finlay that the words “by misfortune” and “without any misconduct” express the same idea—that they are in fact tautologous. I do not think so. I think the legislature meant pure misfortune, whatever that may mean. Where the bankruptcy may be partly caused by misfortune and partly by misconduct but both conduce to it, the bankruptcy would not be caused by misfortune without misconduct. Now apply what I have said to this case. A man of very slender means thinks he has good cause of action, but in which if he is unsuccessful he might reasonably anticipate costs which he would not be able to pay. He is unsuccessful and to such an extent that he has to pay the costs of all the co-respondents. Is the event which has conduced the bankruptcy a misfortune without misconduct within the section? Such a question must be answered in the negative. The action throughout has been within the will and volition of the petitioner,

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and although he may have been justified in bringing the action, the event was directly within his control. I cannot say that the bankruptcy was caused "by misfortune" without any misconduct on his part.

LOPES, L.J. :

Lord Colin Campbell must show that the bankruptcy was caused "by misfortune without any misconduct on his part." I shall not attempt to define the phrase, but where the commencement and prosecution of that which causes the bankruptcy is within the control of the bankrupt, the bankruptcy cannot be caused "by misfortune." The governing word of the section is "misfortune," and unless misfortune can be established he is not within the section. The misfortune was the adverse verdict. The cause of the verdict was Lord Colin Campbell taking the proceedings and prosecuting the proceedings to the end. The proceedings were under his control. He is not within the section and the appeal must therefore be dismissed.

*Appeal dismissed.*

Solicitors : *C. O. Humphreys & Sons*, for Lord Colin Campbell.  
*Lewis & Lewis*, for opposing creditors.

Case referred to :—

*In re Burgess, Ex parte Burgess*, see *ante*, Vol. IV., p. 186.



**PRACTICE.**

**IN RE WILLIAMS, EX PARTE THE CHIEF OFFICIAL  
RECEIVER.**

*Bankruptcy Rules 1886. Rule 18.*

*Transfer of Proceedings—Application at Chambers.*

BEFORE  
MR. JUSTICE  
CAVE.  
1888.  
March 21st.

An application for the transfer of bankruptcy proceedings from the London Court of Bankruptcy to the County Court is an application which should be made to the Bankruptcy Judge at Chambers.

**T**HIS was an application for the transfer of the bankruptcy proceedings from the London Court of Bankruptcy to the County Court at Barrow-in-Furness.

In support of the application a report of the official receiver as trustee was read which showed that there were unsecured creditors against the estate to the amount of 1500*l.*, eleven of whom to the extent of 800*l.* resided in London, one creditor with a debt of 190*l.* resided at Nottingham, and thirty-three creditors to the extent of about 1000*l.* at Barrow.

It was further stated that the whole of the assets consisted of property at Barrow-in-Furness, and that the majority of the creditors in number and value were of opinion that the bankruptcy proceedings could proceed to the best advantage in the County Court there.

*W. W. Aldridge* (the official solicitor) appeared in support of the application.

The bankrupt does not object to the transfer and he does not appear. He has been served with the notice.

[CAVE, J.—I see that he has applied for his discharge and the application is to be heard on April 10th. If a transfer of pro-

1888.      proceedings is ordered it would probably compel him to go to the  
                 County Court. Does the bankrupt object to that ?]  
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      If he does so he should have appeared here and raised the  
objection.

CAVE, J. :

Judgment.      Very well you may take an order. I will say this, however, that  
this is one of the motions which should not be put down in this  
list. It is a motion which could be made in Chambers and should  
be put down in Saturday's list. It need not wait its turn I mean  
as a motion in this motion list, but should come into the list on a  
Saturday.

*Order of transfer accordingly.*

Solicitor : *The Official Solicitor.*

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**PRACTICE.**

IN RE BESWICK, EX PARTE HAZLEHURST.

*Bankruptcy Act, 1883, section 102.**Jurisdiction of County Court—Alleged Fraudulent Deed—13 Eliz. c. 5—Question of Character—Large Amount at Stake—Duty of County Court Judge.*DIVISIONAL  
COURT.BEFORE  
CAVE, J.  
AND  
GRANTHAM, J.  
1888.

March 26th.

Although under section 102 of the Bankruptcy Act 1883 which defines the general power of Bankruptcy Courts, jurisdiction may be given to a County Court Judge to hear a case brought before him, where the amount at stake is large or a question of character is involved it is the duty of such County Court Judge to decline to exercise his jurisdiction unless special circumstances are shown which will justify him in exercising it.

Thus where in May 1885 certain transactions were entered into by a tenant under a lease and his landlord who was also mortgagee of the leasehold, with a view of assisting the tenant who was at that time considerably in debt, but in March 1887 the tenant became bankrupt, and a motion was subsequently made to the County Court by the trustee in the bankruptcy for an order declaring the said transactions fraudulent and void as against him.

*Held:* That even assuming the County Court had jurisdiction, yet such jurisdiction ought not to be exercised since no special circumstances were shown, while a question of character was involved and a large sum was at stake.

**T**HIS was an appeal from a decision of the Judge of the County Court at Crewe by which he held that he had jurisdiction to hear an application made by the trustee in the bankruptcy for an order to have certain deeds declared fraudulent and void; and that having jurisdiction it was expedient that he should hear and determine the said application.

The case raised a question under section 102 of the Bankruptcy Act 1883 which provides:—

“(1) Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose

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IN RE property in any such case. Provided that the jurisdiction hereby  
BESWICK, given shall not be exercised by the County Court for the purpose of  
EX PARTE adjudicating upon any claim, not arising out of the bankruptcy,  
HAZLEHURST. which might heretofore have been enforced by action in the High  
Court, unless all parties to the proceeding consent thereto, or the  
money, money's worth, or right in dispute does not in the opinion  
of the judge, exceed in value two hundred pounds."

In the year 1857 *Hazlehurst*, the present appellant, granted to the bankrupt *Beswick* a mining lease of certain collieries.

In 1885, the lease still continuing, the position of affairs was that *Hazlehurst*, the landlord, was a mortgagee to the extent of something like 21,000*l.*, and there was also due to him arrears of interest, together with arrears of rent to the amount of about 4000*l.*

On May 21st 1885 negotiations took place between the parties which resulted in the surrender of the lease; and on May 22nd 1885 a new lease was granted by *Hazlehurst* subject to the same liabilities, but for an extended time.

In September 1885, however, *Beswick* appeared to be in greater difficulties, no rent or interest on the mortgages being paid, and the landlord being entitled to put an end to the lease it was thereupon agreed that the lease should be terminated, and that the value of the goods of the debtor amounting to about 18,000*l.* should be handed over to *Hazlehurst* as a set-off against his debt.

The lease was accordingly terminated, and *Hazlehurst* subsequently carried on the colliery business, taking over the book debts and paying certain debts due by *Beswick*.

In March 1887 *Beswick* was adjudicated bankrupt upon a petition presented by the Manchester Bank, and on July 21st 1887 a notice of motion was served by the trustee appointed in the bankruptcy upon *Hazlehurst*, by which he asked (1) that the deed of surrender of the lease bearing date May 21st 1885; (2) that the notice bearing date October 6th 1885 to determine the lease of May 22nd 1885; (3) that the agreement whereby the said lease was determined; and

(4) that the transaction with regard to the taking over of the book debts, might be declared fraudulent and void as against him under the Statute of Elizabeth; and that the said deeds, &c., might be delivered up to be cancelled.

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HAZLEHURST.

In support of this application the trustee made an affidavit to the effect "that he was advised and believed that it appeared that the said deeds and indentures, &c., were entered into as part of a scheme to enable the bankrupt to defeat and delay his creditors."

At the hearing of the motion in the County Court objection was taken on behalf of Mr. *Hazlehurst* that the Court had no jurisdiction, or that if it had jurisdiction the case was not one in which the Court ought properly to exercise it.

The County Court Judge, however, decided that he had jurisdiction and that it was expedient that he should hear the motion; and from that decision *Hazlehurst* now appealed, the case being adjourned in the County Court for that purpose.

*E. Cooper Willis, Q.C. (Jackson with him):* for Mr. *Hazlehurst*.

Under the Act of 1869 although jurisdiction was given it was held that in many cases as for example where a large amount was involved or questions of character arose, it was not expedient that the Court should exercise it. The consequence of those decisions was the proviso in section 102 of the Bankruptcy Act 1883. Under that jurisdiction "shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth or right in dispute does not, in the opinion of the judge, exceed in value two hundred pounds." Here there was certainly no consent and the value is something like 18,700*l*. The bankruptcy took place in March, 1887. The transactions impeached took place in the autumn of 1885,—a year and five months before the bankruptcy. They can only be impeached under the statute of Elizabeth. There is no question of fraudulent preference, and no question of act of bankruptcy comes in. Mr. *Hazlehurst* obtained property from the bankrupt in 1885 and the other side say the transaction is impeachable under the statute of Elizabeth. I need only say that Mr. *Hazlehurst* acted

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perfectly *bonâ fide* throughout. His aim all through was to show kindness to and to help the debtor. Even under the Act of 1869 numerous cases were decided holding that it was not expedient to exercise the jurisdiction. (Counsel referred to *Ex parte Dickin, In re Pollard*, L. R. 8 Ch. Div. 377 : 38 L. T. 860 : 26 W. R. 731 ; *Ex parte Brown, In re Yates*, L. R. 11 Ch. Div. 148 : 48 L. J. Bank. 78 : 40 L. T. 402 : 27 W. R. 651 ; *Ex parte Price, In re Roberts*, L. R. 21 Ch. Div. 553 : 47 L. T. 402 : 31 W. R. 104 ; *Ex parte Armitage, In re Learoyd & Co.*, L. R. 17 Ch. Div. 13 : 44 L. T. 262 : 29 W. R. 772.) The present Bankruptcy Act seems to place a limit in cases "not arising out of the bankruptcy." The limit is 200*l*. Therefore where you get a large amount it is out of the jurisdiction of the Court. (Counsel also referred to *In re Lowenthal, Ex parte Beesty*, see *ante*, Vol. I., p. 117 : L. R. 13 Q. B. D. 238 : 53 L. J. Q. B. 524 : 51 L. T. 431 : 33 W. R. 138 ; *In re Hawke, Ex parte Scott & Smith*, see *ante*, Vol. II., p. 1 : L. R. 16 Q. B. D. 503 : 55 L. J. Q. B. 302 : 54 L. T. 54 : 34 W. R. 167.) Even assuming that this transaction was impeachable under the statute of Elizabeth, every creditor had a right to impeach it, and it must have been in the High Court. We should then have had the advantages of the High Court. It cannot be said that this transaction arose out of the bankruptcy. Even if the County Court Judge had jurisdiction the moment the amount was ascertained and it appeared that questions of character arose, for the trustee in his affidavit practically says that the whole transaction was for the purpose of fraudulently defeating the creditors, the judge ought not to have dealt with it. If the transaction is impeachable the case must be brought in the proper Court.

*R. Vaughan Williams* : for the trustee.

This is not a case where it can be argued that there was no jurisdiction. There was jurisdiction on the authorities. But the point really taken was that it was not convenient that the jurisdiction should be exercised. On that the County Court Judge exercised his discretion and your Lordships will not lightly overrule that discretion. The mere fact that it is suggested that a question of character may arise is not sufficient to make the Court not exercise its jurisdiction. I do not deny that in doing what he did

Mr. *Hazlehurst* may have been actuated by a kindly feeling towards *Beswick* but we say that what was done cannot be done. Looking to the whole transaction and the whole correspondence and the whole action of the creditor it does fall within the statute of Elizabeth. I admit there was no moral turpitude on the part of Mr. *Hazlehurst*. Moreover there is no question here which could be conveniently submitted to a jury. Then it is said that a large amount is at stake, but there is no statutory limit when the claim of the trustee is based on a higher title than the bankrupt's. What I submit is that the County Court Judge has exercised his discretion. It does not necessarily follow that any questions of character will arise in the case at all. It has not been suggested that there is any question which could be conveniently tried by a jury. There is no question to be left to a jury. The case will have to be heard before a judge as a question of legal inference. Under those circumstances the County Court Judge exercised his discretion wisely.

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HAZLEHURST.

CAVE, J. :

This case has taken a long time to argue but it really lies in a Judgment nutshell. The only question is whether the County Court Judge ought to exercise his jurisdiction. I assume that he had jurisdiction. It is not necessary to say more as to that. I assume that the County Court Judge had jurisdiction. But in all cases of this kind it still remains to be considered whether the jurisdiction ought or ought not to be exercised. The jurisdiction ought not to be exercised where a large amount is at stake and when questions of character may be involved. Here there is a large amount in dispute far exceeding the amount usually given to a County Court Judge to decide upon. Further than this the ground of the application by the trustee is that the appellant has been party to a transaction for the purpose of defeating and delaying the creditors. It is obvious that in such an enquiry as that questions of character may and will arise, and whenever the amount is large or a question of character arises it is the duty of the County Court Judge to hold his hand and allow the case to go before the proper tribunal unless some special circumstances are shown why he should hear the case. Here, although I gave him every oppor-

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tunity, Mr. Williams cannot tell us any such special circumstances. The County Court Judge appears to have assumed that if he had jurisdiction he ought to exercise it unless special circumstances to the contrary are shown why he should not exercise it. That is not the law and the appeal must be allowed with costs here and below.

GRANTHAM, J.:

I am of the same opinion. It is difficult to imagine a case where the parties would have a greater right to a trial in the High Court than this case. The amount in dispute is in excess of that allowed to be determined in the County Court, and questions of character arise. The appellant was clearly within his right in requiring the County Court Judge to hold his hand, and the County Court Judge was wrong in his decision.

*Appeal allowed with costs.*

Solicitors: *Cooper, Thorowgood & Tabor*, for Mr. Hazlehurst.

*Robinson, Preston & Stow*, for the trustee in the  
bankruptcy.

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## IN RE NORRIS, EX PARTE REYNOLDS.

*Bankruptcy Act, 1883, section 6, sub-section 1 (d).**Petition by Creditor—Jurisdiction—Debtor ordinarily residing in England—  
Residence at Hotel.*COURT OF  
APPEAL.BEFORE THE  
LORD  
CHANCELLOR,  
THE MASTER  
OF THE  
ROLLS,  
BOWEN, L.J.  
1888.

April 13th.

Where a debtor who was not domiciled in or had a dwelling-house or place of business in England, had for eighteen months previous to the presentation of a bankruptcy petition against him, a room at an hotel in London which he paid for continuously during that time, and was treated as an ordinary resident there.

*Held*: That the said debtor had "ordinarily resided in England" within the meaning of section 6, sub-section 1 (d) of the Bankruptcy Act 1883; and that the creditor was entitled to present a bankruptcy petition against him.

THIS was an appeal on behalf of *G. Reynolds*, a creditor, from an order of Mr. Registrar Hazlitt, setting aside a bankruptcy notice served upon the debtor *J. Norris*.

The case raised a question under section 6, sub-section 1 (d) of the Bankruptcy Act 1883 which provides:—

"(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless— \* \* \* (d) The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided, or had a dwelling house or place of business in England."

In February 1888 a bankruptcy notice was served upon the debtor *Norris*, by Mr. *Reynolds* who had obtained judgment against him for 1000*l.*: but an affidavit in opposition was thereupon filed by the debtor in which he alleged that he was an American citizen residing at Brussels; that he was not domiciled in England; and was not subject to the jurisdiction of the Court.

On behalf of the creditor it was contended that the debtor had a residence in England and had a place of business here; and evidence was brought forward to show that the said debtor who described himself as a financial agent and was chiefly occupied in promoting the formation of public companies, had for the last four or five years been continually in England living at various hotels;

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 REYNOLDS.

and that on November 10th 1886 he took a room at the Hotel Metropole, which he had kept on and paid for continuously ever since.

The learned registrar, however, set aside the bankruptcy notice ; and from that decision the creditor now appealed.

*E. Cooper Willis, Q.C. (Hilbery with him) : for Mr. Norris.*

I shall not attempt to argue that the debtor was domiciled in England. But in carrying out his business of attempting to promote companies he has been over in England for the last four or five years writing from and transacting business at various hotels. Since November 1886, eighteen months ago, he has had continuously and paid for continuously, a room at the Hotel Metropole. He has therefore ordinarily resided ; he has had a dwelling house ; and he has had a place of business, in England. The Hotel has been his place of business. (Counsel referred to *Holroyd v. Whitehead*, 3 Camp. 530 : 2 Rose, 245 ; *Ex parte Brewell, In re Bowie*, L. R. 16 Ch. Div. 48 : 29 W. R. 299.)

*Herbert Reed : for the debtor.*

It is for the creditor presenting a petition against a debtor to satisfy the Court that it has jurisdiction. When the matter was before the registrar he decided as a matter of fact that *Norris* was not resident in this country and had no place of business here. It would be very strange if a room taken at an hotel could be a place of business. Here the evidence—if there is any at all—is exceedingly slight to show that *Norris* ever did any business, or at any rate at all at the Hotel Metropole. It can only be suggested that he was connected with an endeavour to get up some companies.

[BOWEN, L.J.—From November 1886 to February 1888 was he not continuously at the hotel ?]

That question was never put directly to the bankrupt in examination as it ought to have been. *Norris* resided in Brussels,—his wife and family were there—and the registrar on the facts found in his favour.

THE LORD CHANCELLOR (LORD HALSBURY):

I am unable to concur with the registrar in this case, and I cannot but think that there was some error in the mode in which the question was argued before him which caused him to come to the conclusion to which he did. The judgment of the registrar is before us and he seems to infer by it that the man could not have an ordinary residence in England and also an ordinary residence in Brussels. That is not so and if such was the registrar's opinion I must disagree with him. Then again the evidence in this case is much too loose to say that there was a place of business at an hotel, but by his judgment the registrar seems to infer that it is impossible for a man having a residence in a foreign country to transact business in an hotel, and with that I cannot agree, although, as I have said, the question is not of consequence here, because the evidence in this case is much too loose to say that the debtor had a place of business at an hotel. The judgment of the registrar, therefore, is not satisfactory, but I must say I think that is quite accounted for by the extremely involved manner in which the case appears to have been put before him. The question is simply whether any one of the three precedents to jurisdiction exists. The words of the section are—"has ordinarily resided, or had a dwelling house or place of business in England" and it is clear to me that this debtor had ordinarily resided in England for the period necessary. It is a question of fact and degree. It is not at all necessary that because a man stays at an hotel he resides there, but it may be so, and in this particular case this man for eighteen months had a room in the Hôtel Métropole, he paid for it whether he was there or not, he paid for attendance, and he was treated as an ordinary resident there. That would point to an ordinary residence in this country. It is a question of fact and looking at the whole of the evidence I have come to the conclusion that the debtor has ordinarily resided in England during the prescribed time, and the appeal must therefore be allowed.

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NORRIS,  
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REYNOLDS.  
Judgment.

THE MASTER OF THE ROLLS (LORD ESHER):

I am of the same opinion that in this particular case this person comes within the predicament that he did ordinarily reside in England, but I desire to express myself with extreme care in view

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 IN RE  
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of the arguments which appear to have been taken before the registrar. It was said that this debtor was domiciled in England and there is no pretence for saying that such was the case. Then it was strongly argued that he had a place of business. But I think place of business in the section means a definite place of business. If a man had an office and a staff of clerks that would certainly be so; and if a man had a room at an hotel where he kept samples and was in the habit of seeing customers there, that would be a place of business. But if all a man does is to negotiate paper contracts in some part of a public hotel there would in my opinion be great difficulty in saying that the hotel was a man's place of business. In this case I do not think the hotel was proved to be the place of business. Then it was said that the debtor had a dwelling house, but I cannot myself think that a person who stays and pays ordinarily at an hotel makes the hotel his "dwelling house" even though he stays there for months. Then did the debtor "ordinarily reside in England"? Now "ordinarily reside" I think means something of the nature of residence, but I do not think that the mere general staying at an hotel is residence at all. At any rate I may say that I should doubt it although I do not pretend to give a definite opinion. But in this case there is something more. Where a man has exclusive use of lodgings and pays for them he does reside. Here the debtor took part of the hotel; he kept it for himself; he paid for it and used it just as if it were a lodging in the hotel. So I think he did reside there and in this case it may properly be said that the debtor had ordinarily resided in England.

BOWEN, L.J. :

I am of the same opinion on the ground that the evidence shows that for a period during the prescribed year long enough to warrant the use of the term this debtor ordinarily resided at the Hôtel Métropole.

*Appeal allowed.*

Solicitors :—*Hilberry & Co.*, for the creditor.

*A'Beckett Terrell & Co.*, for the debtor.

## PRACTICE.

IN RE OTWAY, EX PARTE OTWAY.

*Bankruptcy Act, 1883, section 103, sub-section (5).**Judgment Summons—Alimony—Receiving Order in lieu of Committal—Payment by Instalments—Debtors Act 1869 (32 & 33 Vict. c. 62) section 5.*BEFORE  
MR. JUSTICE  
CAVE.  
1888.April 14th  
and 25th.

An order for alimony *pendente lite* followed by a further order for permanent alimony having been made in the Divorce Court, and the sum of 130*l.* being due from the husband under these orders, a judgment summons in respect thereof was issued by the wife.

*Held:* That in such case a receiving order in lieu of committal could not be made by the Court under section 103, sub-section (5) of the Bankruptcy Act 1883, the wife not being strictly a "judgment creditor."

But that she was entitled to come to the Court under section 5 of the Debtors Act 1869; and that an order directing payment of the sum due by instalments of 10*l.* a month should be made.

THIS case came before Mr. Justice CAVE in Chambers in the shape of a judgment summons issued by Mrs. *Otway* the wife of the debtor against her husband for non-payment of 130*l.* 4*s.*

On December 1st 1887 a decree for a judicial separation between Mr. and Mrs. *Otway* was made in the Divorce Division of the High Court, it having been found that both husband and wife had been guilty of adultery; and that the husband had not connived at the adultery of the wife but had been guilty of cruelty.

On January 30th 1888 an order for alimony *pendente lite* was made at the rate of 25*s.* a week from the date of the service of the citation on June 28th 1886 to the date of the decree on December 1st 1887.

On February 1st 1888 an order for permanent alimony at the rate of 2*l.* 2*s.* a week was made from the date of the final decree.

The sum of 130*l.* 4*s.* being due under these orders a judgment summons was taken out by Mrs. *Otway* against her husband, and on March 24th 1888 Mr. Justice CAVE made a receiving order against the debtor under section 103 sub-section (5) of the Bankruptcy Act 1883 which provides that "Where under section five of

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the Debtors Act 1869, application is made by a judgment creditor to a Court having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made."

The learned judge, however, subsequently granted an application made to him on behalf of the debtor to stay the receiving order and to allow the case to be reheard and argued before him on the question whether under the circumstances a receiving order should be made.

The case now came on for argument accordingly.

*B. Abrahams* (solicitor) appeared for Mrs. Otway.

*Sidney Wolf*: for the debtor.

No doubt after the decision in the case of *In re Linton, Ex parte Linton* (see *ante*, Vol. II. p. 179: L. R. 15 Q. B. D. 289: 54 L. J. Q. B. 529: 52 L. T. 782: 33 W. R. 714:) these are orders—or the order for permanent alimony is an order—enforceable under section 5 of the Debtors Act 1869, the sums being debts due in pursuance of orders of a competent Court. But to enable the Court to make a receiving order under section 103 sub-section (5) of the Bankruptcy Act 1883 the application under section 5 of the Debtors Act 1869 must be by a "judgment creditor" against a judgment debtor. These orders are not judgments and cannot be enforced like judgments. In *Bailey v. Bailey* (L. R. 13 Q. B. D. 855: 53 L. J. Q. B. 583: 50 L. T. 722: 32 W. R. 856) it was held that "An order to sign final judgment under Order XIV. Rule 1 will not be made where the action is for arrears of alimony *pendente lite* payable under an order of the Probate and Divorce Division." In *In re Fryer, Ex parte Fryer* (see *ante*, Vol. III. p. 231: L. R. 17 Q. B. D. 718: 55 L. J. Q. B. 478: 55 L. T. 276: 34 W. R. 766) it was held that "The Court has jurisdiction to make a receiving order, in lieu of a committal, against a judgment debtor, under section 103, sub-section (5) of the Bankruptcy Act, 1883, only

on the application of a person who is strictly speaking a 'judgment creditor.' Such receiving order cannot be made, therefore, on the application of every person who is entitled to apply to the Court under section 5 of the Debtors Act, 1869. Where an order is made in the Divorce Court directing the co-respondent to pay to the husband, the petitioner in the suit, the amount given as damages forthwith for the purpose of settlement on the children of the marriage, such husband is not a 'judgment creditor' of the co-respondent within the meaning of section 103, sub-section (5), of the Bankruptcy Act. Where a judgment debtor makes default in payment of the judgment debt the Court has power of committal under section 5 of the Debtors Act, 1869, if proof is given that such debtor has had the means of paying part of the said debt, even though he has not had the means of paying the whole amount." And in *In re Henderson, Ex parte Henderson* (see ante, p. 52) it was held that "An order made in the Divorce Court for the payment to a wife by her husband of alimony *pendente lite* is not a 'final judgment' within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon which a bankruptcy notice can be founded on failure of the husband to pay such alimony as directed." Rule 203 of the Divorce Rules 1877 requires an affidavit of service of the order and non-payment before execution can issue; and unlike judgments these orders may be varied. Moreover here there was no sufficient evidence of means; and it is shewn that bankruptcy would work a forfeiture of a reversionary interest of the debtor.

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CAVE, J.:

In this case a judgment summons was issued under which in the Judgment. absence of the defendant or at any rate in the absence of any argument being raised on his behalf I made on March 24th a receiving order against him under section 103 sub-section (5) of the Bankruptcy Act 1883. Application was subsequently made to me, however, to stay that receiving order and to rehear the case on the question whether a receiving order should be made. The case was argued on April 14th. On January 30th 1888 Mrs Otway obtained

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an order for alimony *pendente lite* and on February 1st an order for permanent alimony was made at the rate of 2*l.* 2*s.* a week. Section 5 of the Debtors Act 1869 provides that "Subject to the provisions hereinafter mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court." By section 103 sub-section (5) of the Bankruptcy Act 1883, "Where, under section five of the Debtors Act, 1869, application is made by a judgment creditor to a court, having bankruptcy jurisdiction, for the committal of a judgment debtor, the court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor." In the case of *In re Fryer, Ex parte Fryer* (see *ante*, Vol. III. 281 : L. R. 17 Q. B. D. 718) it was laid down that "the Court has jurisdiction to make a receiving order, in lieu of a committal, against a judgment debtor under section 103 sub-section (5) of the Bankruptcy Act 1883 only on the application of a person who is strictly speaking a 'judgment creditor.' Such receiving order cannot be made, therefore, on the application of every person who is entitled to apply to the Court under section 5 of the Debtors Act 1869." The term "judgment creditor" in section 103 sub-section (5) of the Bankruptcy Act must be construed strictly. In *Bailey v. Bailey* (L. R. 13 Q. B. D. 855 : 53 L. J. Q. B. 583 : 50 L. T. 722 : 32 W. R. 856) it was held that "An order to sign final judgment under Order XIV. Rule I. will not be made where the action is for arrears of alimony *pendente lite* payable under an order of the Probate and Divorce Division." That shews that the wife in such case cannot be said to be a judgment creditor in the strict sense, and the same reasoning is applicable in the case of permanent alimony. It follows therefore that Mrs. Otway is not a judgment creditor and cannot have a receiving order. But she is entitled to come to this Court under section 5 of the Debtors Act 1869, as is shewn by *In re Linton, Ex parte Linton* (see *ante*, Vol. II. p. 179 : L. R. 15 Q. B. D. 289). Therefore I will direct the receiving order to be reversed and instead of it I shall order Mr. Otway to pay the



amount by instalments of 10*l.* a month, the first instalment to be paid on May 21st.

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*Order accordingly.*

Solicitors: *B. Abrahams* for Mrs. Otway.

*Michael Abrahams & Co.* for the husband.

Cases relied upon or referred to:—

*In re Linton, Ex parte Linton*, see *ante*, Vol. II. p. 179:  
L. R. 15 Q. B. D. 239: 54 L. J. Q. B. 529: 52 L. T. 782:  
83 W. R. 714.

*Bailey v. Bailey*, L. R. 13 Q. B. D. 855: 53 L. J. Q. B. 583:  
50 L. T. 722: 32 W. R. 856.

*In re Fryer, Ex parte Fryer*, see *ante*, Vol. III. p. 281: L. R.  
17 Q. B. D. 718: 55 L. J. Q. B. 478: 55 L. T. 276: 34  
W. R. 766.

*In re Henderson, Ex parte Henderson*, see *ante*, p. 52.

## PRACTICE.

### IN RE TALLERMAN, EX PARTE ROONEY.

*Bankruptcy Act*, 1883. *Schedule II. Rule 25.*

BEFORE  
MR. JUSTICE  
CAVE,  
1888.  
April 25th.

*Proof—Application to Reduce or Expunge—Application in Name of Creditor for Benefit of Bankrupt—Abuse of Process.*

Where application was made under Rule 25 of Schedule II. of the Bankruptcy Act 1883, by one creditor in the bankruptcy to reduce or expunge the proof of another creditor, but it was shewn that such application although made in the name of the creditor was in reality for the benefit and on behalf of the bankrupt.

*Held*: That it is not permissible to use the process of the Court to do indirectly that which the process of the Court will not allow to be done directly; and that the application must be dismissed.

THIS was an application made in the name of Mr. Rooney, a creditor in the bankruptcy, under Rule 25 of Schedule II. to the

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Bankruptcy Act 1883 to reduce or expunge a proof tendered by another creditor, Messrs. *Furber, Price & Furber*.

A preliminary objection was taken, however, that the application although made in the name of the creditor was really for the benefit and on behalf of the bankrupt.

*Mirams* : for the creditor Rooney.

*F. C. Willis* : for Messrs. *Furber, Price & Furber*.

I have a preliminary objection. The debtor was made a bankrupt in 1885, and not then for the first time. My objection to this application is that it is not an application to expunge the proof on behalf of the creditor but of the bankrupt in order that he may make a fresh application for his discharge. The sole object of this creditor making it is because the bankrupt could not do so. Your Lordship will not allow a creditor to be put up for a debtor. In *In re Dashwood, Ex parte Kirke* (see *ante*, Vol. III. p. 257) it was held that "The Court will not allow its process to be used to do indirectly that which the process of the Court will not allow to be done directly. Thus where application was made by a friendly creditor for discovery of documents, nominally for the purpose of carrying out proceedings to expunge a proof, but in reality for the purpose of reopening, after time for appeal had elapsed, the question as to whether the receiving order had been properly made against the bankrupt or not. It was held that the application was an attempt by the contrivance of the creditor and the bankrupt, in the interest of the bankrupt, to use the process of the Court to do that which if the bankrupt himself asked the Court, the Court would not allow to be done; and that the registrar was quite right in refusing it." There is no provision in the Act or Rules to entitle the bankrupt to make such an application at any rate unless there will be a surplus. Rule 23 of Schedule II. provides that "If the trustee thinks that a proof has been improperly admitted, the Court may on the application of the trustee, after notice to the creditor who made the proof, expunge the proof or reduce its amount." And by Rule 25 "The Court may also expunge or reduce a proof upon the application of a creditor if the trustee declines to interfere in the matter, or in the case of a composition

or scheme, upon the application of the debtor." Here the debtor was bankrupt. There is this further point, in this case the trustee has not declined to interfere and until the trustee declines no creditor even has a right to apply to the Court. The trustee was willing to apply and wrote a letter asking for funds and promised to apply if funds were sent.

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[CAVE, J.—Is the trustee authorised to refuse to apply unless he is put in funds or at any rate if he does so is it not a refusal which will justify the creditor in applying?]

That may be. I submit however that the application is really on behalf of the bankrupt. The solicitor of the creditor who is instructing my friend here to-day has admitted that—that the bankrupt could not make the application on his own behalf, and that *Rooney* was to make it for him.

[Mr. *W. J. Ball*, the solicitor for Mr. *Rooney*, the creditor, was placed in the box and admitted that the real object of the application was to benefit the bankrupt.]

*Mirams* :

Whatever the cause of the motion by Mr. *Rooney* may be he was entitled to make it. Even if his desire was to benefit the bankrupt *Tallerman*, it does not affect the question.

CAVE, J. :

I think that the preliminary objection must prevail. Un-Judgment. doubtedly as laid down in the case of *In re Dashwood, Ex parte Kirk* (see *ante*, Vol. III. p. 257) it is not permissible to attempt to use the process of the Court to do indirectly that which the process of the Court will not allow to be done directly. With regard to a question of proof so long as a creditor is coming forward *bonâ fide* to challenge the decision of a trustee he may do so, but in a case of this kind where there is no expectation that the dividend would be increased by excluding the creditor, some other reason must be looked for. Now *Ball* the solicitor says that the object is to benefit the bankrupt—to get the debts reduced in order that he may make

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a fresh application for discharge. The bankrupt could not make the application and Rooney does it for him. A creditor may as I have said come forward *bonâ fide* for his own purposes to make such an application as this but he may not make it for such a purpose as is attempted here, and the application must therefore be dismissed.

*Application dismissed.*

Solicitors: *W. J. Ball*, for the creditor Rooney.

*R. Furber*, for Messrs. Furber, Price and Furber.

Case relied upon:—

*In re Dashwood, Ex parte Kirk*, see *ante*, Vol. III. p. 257.

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**PRACTICE.****IN RE GALLARD, EX PARTE HARRIS.***Bankruptcy Rules 1886. Appendix Part II. Section VII. Rule 2.**Solicitor—Costs—Sale of Mortgaged Property by Trustee in Bankruptcy—Percentage—Solicitors Remuneration Act 1881 (44 & 45 Vict. c. 44) General Order Section 2 and Schedule I. Rule 9.*BEFORE  
MR. JUSTICE  
CAVE.  
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April 26th.

The official receiver as trustee in the bankruptcy entered into a contract for the sale of certain property of the bankrupt which was subject to a mortgage. Such sale was duly completed, the mortgagee executing a reconveyance and his debt being paid out of the purchase money.

On taxation a percentage on the whole amount received for the said property was allowed by the County Court Registrar to the solicitors who acted for the official receiver in carrying out the sale.

*Held* : That the percentage so allowed was right : that the meaning of the proviso in Rule 2 of Section VII. Part II. of the Appendix to the Bankruptcy Rules 1886, is, that the percentage is not to be paid twice over : and that as in the present case no part of the proceeds of sale were chargeable with a percentage by the mortgagee's solicitors, the vendor's solicitors were entitled to the whole percentage.

*Quære* : Whether any circumstances can arise under which the mortgagee's solicitors would be entitled to a percentage.

**T**HIS was an appeal by the trustee in the bankruptcy from the taxation by the Registrar of the County Court at Brighton of certain bills of costs.

The case raised the important question whether upon a sale of property of a bankrupt which is subject to a mortgage by the official receiver as trustee or by any trustee in bankruptcy, the solicitor of the trustee is entitled to be paid percentage under the Solicitors Remuneration Act upon the whole amount received, or simply upon the value of the equity.

On July 26th 1887 a petition was presented against the debtor *Gallard* upon which a receiving order was subsequently made.

In August 1887 the first meeting of creditors was held but adjourned until October, the official receiver acting as trustee in the bankruptcy until October 14th when a trustee was appointed by the creditors and received his certificate.

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During the time that he was trustee, the official receiver entered into a contract for the sale of certain property of the bankrupt known as Alldrington House, the contract price being 4750*l*.

This property was subject to a mortgage for 3000*l*.

On October 18th 1887 the sale was completed by the trustee appointed by the creditors and by the official receiver. The mortgagee did not join but a reconveyance was executed by him and the trustee paid the 3000*l*. due on the mortgage out of the purchase money.

On taxation the County Court registrar allowed to Messrs. *Griffiths & Eggar* who acted as solicitors for the official receiver a percentage on the sum of 4750*l*., being the whole amount received :

Objection was taken, however, to this allowance by the trustee in the bankruptcy on the grounds :—

(1) That the sale was not completed by the official receiver but by the trustee after his appointment ; that the trustee conveyed the property and received the purchase money, and the official receiver was an unnecessary party to the deed.

(2) That the scale charge did not apply. The percentage under Rule 2 of the General Regulations, Section VII. Part 2 of the Appendix to the Bankruptcy Rules 1886 could only be upon so much of the proceeds of the sale as were not chargeable by the mortgagee's solicitor. The proceeds of the sale only amounted to 1750*l*., so that even if the scale were allowed, the scale costs would not amount to the sum claimed.

The Taxing Master's remarks on these objections were as follows :—

(1) "I find that the sale was arranged by the official receiver for whom Messrs. *Griffiths & Eggar* acted throughout; that all the work contemplated by the General Order under the Solicitors Remuneration Act to entitle them as vendor's solicitors to the commission under Schedule I. of the Scale has been done. That the appointment was made to complete the purchase on October 6th, but that owing to the act of the mortgagee's solicitors (a member of whose firm is one of the committee of inspection) the said completion was postponed to October 18th. That in so doing the

mortgagee's solicitors were acting in unison with the trustee, and with the object of postponing the completion until after the certificate of the trustee's appointment. Such certificate bears date October 14th 1887 and in fact the legal estate then shifted to such trustee. The official receiver is, however, a party to the conveyance, the purchaser refusing to complete without his concurrence, and I am of opinion that Messrs. *Griffiths & Eggar* have done all the work as aforesaid and are entitled to the commission as acting for the vendor within the meaning of the general order.

(2) I agree with the objection, but as no part of the proceeds of sale are chargeable with a percentage by the mortgagee's solicitors I think the vendor's solicitors are entitled to the whole percentage. I may add that the regulation appears to me unintelligible as it is difficult to conceive any circumstances under which the mortgagee's solicitors would be entitled to a percentage."

The matter now came before the Court for its decision.

*Sidney Woolf*: for the trustee.

What I submit is that the percentage ought to be paid on the amount the equity realised and that the amount of the mortgage ought not to be taken into account. The registrar allowed percentage on 4750*l.*: whereas I contend that it ought only to be upon 1750*l.* There appears to be no Rule before 1886. By Rule 2 of the General Regulations in Section VII. Part II. of the Appendix to the Bankruptcy Rules 1886 which deals with solicitors' costs it is provided that "In respect of business connected with sales, purchases, leases, mortgages and other matters of conveyancing, and in respect of other business not being business transacted in Court or in Chambers and not being otherwise contentious business, the solicitor's remuneration shall (in the absence of any agreement to the contrary) be regulated by the General Order under the Solicitors Remuneration Act 1881, for the time being in force; provided that, in cases of sales of mortgaged properties, the trustee's solicitor, if his remuneration shall be under Schedule I. of the existing order, shall only be entitled to percentage upon so much of the proceeds of sale as shall not be chargeable by the mortgagee's solicitor with the percentage, and such percentage shall be payable only out of the proceeds of sale." Under the

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General Order made in pursuance of the Solicitors Remuneration Act 1881 it is provided that (2) . . . the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court, or in the Chambers of any judge or master, is to be regulated as follows, namely:—(a) In respect of sales, purchases and mortgages completed, the remuneration of the solicitor having the conduct of the business whether for the vendor, purchaser, mortgagor or mortgagee, is to be that prescribed in Part I. of Schedule I. to this order, and to be subject to the regulations therein contained." The Schedule provides for a percentage on the purchase money. The effect of the "General Regulations" under the Bankruptcy Rules 1886 is to give the trustee's solicitor his percentage only on the "proceeds of sale" so far as the trust estate receives them. He is to be paid only out of the proceeds of the sale, which were here 1750*l.*, and unless his percentage is to be paid only on that sum the consequences are very serious. If the trustee's solicitor is to receive a commission on the whole amount including the mortgage the estate must be very heavily burdened especially where, as in the present case, there are several encumbered properties. (Counsel referred to *In re Grey's Brewery Company*, 56 L. T. 298.) All the estate received was 1750*l.*, and I submit that the solicitor's commission is on that sum.

*Muir Mackenzie*: for Messrs. Griffiths & Eggar.

The matter is clear under the Solicitors Remuneration Act. No part of the proceeds of sale is charged with the percentage of the mortgagee's solicitor, and the trustee's solicitors are entitled to a percentage on the whole amount.

CAVE, J.:

Judgment.

This case was very properly brought before me. Some difficulty does seem to arise on the Bankruptcy Rules. The provisions in the Solicitors Remuneration Act are tolerably clear. If there is a vendor of mortgaged property and the solicitor sells free from incumbrance say for 5000*l.*, there is no reason why he should not have his per-



centage on the 5000*l.* It cannot make any difference whether the 5000*l.* comes wholly to the vendor or is applied to pay off the debt. Occasionally, however, property is sold subject to incumbrance. Then the question arises whether the solicitor should be paid subject to the incumbrance or on the amount realised plus the incumbrance. Rule 9 in the Schedule of the General Order to the Solicitors Remuneration Act 1881 provides for that—"Where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase money, except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption." The incumbrance is to be deemed a part of the purchase money and the solicitor gets his percentage. Whether the solicitor sells subject to or free from incumbrance, therefore, his percentage is reckoned on the total value of the estate. Then we come to the Bankruptcy Rules 1886. Rule 2 of the General Regulations in Section VII. of Part II. in the Appendix of those Rules provides that "In respect of business connected with sales, purchases, leases, mortgages and other matters of conveyancing, and in respect of other business not being business transacted in Court or in Chambers, and not being otherwise contentious business, the solicitor's remuneration shall (in the absence of any agreement to the contrary) be regulated by the General Order under the Solicitors Remuneration Act 1881, for the time being in force;"—Now if the rule stopped there it is clear that the solicitor would be entitled to a percentage on the gross value of the property. But the rule goes on—"provided that, in cases of sales of mortgaged properties, the trustee's solicitor, if his remuneration shall be under Schedule I. of the existing order, shall only be entitled to percentage upon so much of the proceeds of sale as shall not be chargeable by the mortgagee's solicitor with the percentage, and such percentage shall be payable only out of the proceeds of sale." Now whether there is or is not a state of affairs to which that is applicable it is clear that the meaning is that the percentage is not to be paid twice over as to any part of the purchase money, once to the mortgagee's solicitor and once to the trustee's solicitor, so that the estate may not be charged with a double percentage. Whether the circumstances can occur or not I do not know. I cannot pretend to answer such

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a question off hand. The registrar who is a man of great experience in such matters appears to be unaware of any such case. But whether or no such circumstances can arise or whether the rule is so drawn from excess of caution, whatever the motive may have been the result is clear. Here the mortgagee's solicitor is not entitled to any part of the percentage. He had nothing to do with the sale. The mortgagee's money is handed over to him and he executed a reconveyance. Now that what took place caused some costs is true, but those are the costs of the reconveyance which are otherwise provided for and not of the sale at all. In my opinion therefore the taxing master was right in his decision and the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors: *Ashurst, Morris & Crisp*, for the trustee.  
*Griffiths & Eggar*, for the solicitor.

Case referred to:—

*In re Greys Brewery Company*, 56 L. T. 298.



## IN RE MARTIN, EX PARTE THE BOARD OF TRADE.

*Bankruptcy Act, 1883, section 21.*BEFORE  
MR. JUSTICE  
CAVE.  
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and 27th.

*Notification to the Court by the Board of Trade of Objection to Appointment of a Trustee—Trustee under Previous Deed of Assignment Appointed Trustee in Bankruptcy—Grounds of Objection—Difficulty of Acting with Impartiality in the Interests of the Creditors generally.*

On October 1st, 1887, a deed of assignment was executed by a debtor for the benefit of his creditors, under which a trustee was appointed who dealt with the estate.

On December 10th, 1887, a petition was presented against the debtor upon which a receiving order was made and the debtor adjudged bankrupt, the act of bankruptcy alleged being the execution of the said deed.

On February 11th, 1888, by a special resolution of the creditors the trustee under the said deed of assignment was appointed trustee in the bankruptcy, but the Board of Trade under section 21, sub-section (2) of the Bankruptcy Act 1883, objected to this appointment on the ground that the connection of the person so appointed with the bankrupt's estate made it "difficult for him to act with impartiality in the interest of the creditors generally," it being alleged (1) that he had dealt with the estate of the bankrupt with notice of the act of bankruptcy on which adjudication was made: (2) that he was accountable to the trustee in the bankruptcy in respect of such dealings: (3) that he had in his hands moneys forming part of the property of the bankrupt which he had failed to pay over, and that the question in respect thereof could only be ascertained by an investigation instituted by some other independent trustee.

*Held:* That the objection must be sustained: that the person so appointed trustee had put himself into the position in which he would have to decide between his own interests and the claims of the creditors: and that upon the facts brought to the notice of the Court beyond proof that it was difficult for him to exercise strict impartiality there was reason to suspect that he had already failed in doing so.

**T**HIS was a Notification to the Court by the Board of Trade of their objection to the appointment of a trustee, under section 21 of the Bankruptcy Act 1883.

Section 21 provides—(1) "Where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt; or they may resolve to leave his appointment to the committee of inspection hereinafter mentioned."

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(2) "The person so appointed shall give security in manner prescribed to the satisfaction of the Board of Trade, and the Board, if satisfied with the security, shall certify that his appointment has been duly made, unless they object to the appointment, on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interest of the creditors generally."

(3) "Provided that where the Board make any such objection they shall, if so requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide on its validity."

In the present case the Board of Trade had objected to the appointment of one *John Jenkins* as trustee in the bankruptcy of *Frederick Martin*, upon the grounds stated in the notification following:—

*Notification of the Objection of the Board of Trade to the Appointment of Mr. John Jenkins as Trustee in the above matter and Report communicating the grounds of the Board of Trade's Objection.*

1. The Board of Trade having been requested by a statutory majority of the Creditors in the above matter by a Requisition dated the 10th day of March 1888 a copy of which has been duly transmitted to the Senior Bankruptcy Registrar of the High Court of Justice to notify to the High Court of Justice the objection of the Board of Trade to the appointment of Mr. John Jenkins of Philharmonic Chambers Cardiff as Trustee of the property of the above named Frederick Martin a Bankrupt hereby notify to the Court that the Board of Trade object to the said appointment on the ground that the said John Jenkins' connection with or relation to the estate of the Bankrupt makes it difficult for him to act with impartiality in the interest of the creditors generally.

The Board of Trade with this notification hereby also submit the following Report to the High Court of Justice in which the grounds of their said objection are communicated to the Court.

*Report of the Board of Trade.*

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1. On the 10th day of December 1887 the petition in this Bankruptcy was filed in the said County Court by a Creditor of the above named Bankrupt and a Receiving Order was made thereon on the 6th day of January 1888.

2. The Act of Bankruptcy on which the said Receiving Order was made was the execution by the Debtor on the 1st day of October 1887 of a Deed of Assignment for the benefit of his Creditors.

3. The Trustee under the said Deed of Assignment was the above named John Jenkins of Philharmonic Chambers Cardiff.

4. On the 11th of January last being shortly after the making of the said Receiving Order the Official Receiver of the Bankruptcy District of the said County Court who had been by the said Receiving Order constituted Receiver of the Debtor's Estate wrote and sent to the said John Jenkins a letter in the words and figures following :—

CARDIFF,  
 11th Jan. 1888.

DEAR SIR,

*Re Fred. Martin.*

I am informed that you are in possession of some of the Debtor's property that came to your hands as a Trustee under a Deed of Assignment executed by the Debtor, you are aware no doubt a Receiving Order has been made against him, and under these circumstances I shall feel obliged by your furnishing me with an account showing your dealings with the Estate and handing me the Balance you have on hand.

JOHN JENKINS,  
 Cardiff.

Yours truly,  
 T. H. STEPHENS.

5. On the 19th of January last the said John Jenkins wrote to the said Official Receiver a letter in the words and figures following and with the said letter enclosed an account purporting to show the amounts received and paid by him under the said Assignment and a cheque for £48 18s. 4d. the amount of the balance admittedly due from him to the Estate of the Bankrupt.

CARDIFF,  
 19 January, 1888.

DEAR SIR,

*Re Frederick Martin.*

I now beg to enclose you account showing amounts received and paid by me in respect of this Estate with cheque 48l. 18s. 4d. to balance. Kindly acknowledge receipt and oblige,

T. H. STEPHENS, Esq.

Yours faithfully,  
 JOHN JENKINS.

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IN RE  
MARTIN,  
EX PARTE  
THE BOARD  
OF TRADE.

6. On the 21st day of January 1888 the Debtor was adjudged Bankrupt and on the 23rd day of January an Order was made for the administration of the Estate in a summary manner pursuant to Section 121 of the Bankruptcy Act 1888.

7. On the 11th day of February 1888 the First meeting of the Creditors of the Bankrupt was held and at such meeting the said John Jenkins was by a special Resolution of the said Creditors appointed to fill the office of Trustee of the property of the Bankrupt with a Committee of Inspection.

Creditors to the amount of 184*l.* 13*s.* 8*d.* voted in favour of the said Special Resolution and Creditors to the amount of 227*l.* 19*s.* 8*d.* voted against it.

8. On the 13th of February the said appointment by the Creditors of the said John Jenkins to fill the said office of Trustee was reported to the Board of Trade.

9. On the 16th of February the said Official Receiver wrote to the said John Jenkins a letter of that date applying to the said John Jenkins for the re-payment of a sum of 10*l.* 1*s.* 8*d.* debited against the Estate in the Account of the receipts and disbursements of the said John Jenkins as Trustee under the said Deed of Assignment for costs and expenses incurred in opposing the Bankruptcy Petition.

10. Correspondence then passed between the said Official Receiver and the said John Jenkins in which the Official Receiver applied in effect for further accounts of the dealings by the said John Jenkins with the Estate and the said John Jenkins replied in effect that he had furnished accounts of all his transactions with the Estate which he was advised he was legally liable to render.

11. The said John Jenkins has not paid to the credit of the Estate the said sum of 10*l.* 1*s.* 8*d.*

12. On the 16th of February the Board of Trade caused to be written and sent to the said John Jenkins a letter pointing out that having dealt with the Bankrupt's Estate under the said Deed of Assignment he was an accounting party to the Estate and that his appointment was in the opinion of the Board of Trade open to objections on that ground and inviting him to consider whether he would withdraw from the Office of Trustee. The said letter was omitting the formal parts thereof in the words following :—

"A report of your election as Trustee in the above matter has been received in this Department but it would appear that you were the Trustee under a Deed of Assignment executed by the Debtor for the benefit of his Creditors and as such you are an accounting party to the Estate and your appointment as trustee under the Bankruptcy would therefore be open to objection on the ground of your connection with the Debtor and his Estate.

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"In these circumstances you will probably feel that you cannot properly undertake the functions of Trustee in the bankruptcy and will be prepared to withdraw from the Trusteeship. If on the other hand you apprehend that the considerations to which your attention has been drawn do not apply I am directed by the Inspector General in Bankruptcy to request that you will furnish any observations you may wish to make in the matter in order that they may be placed before the Board of Trade, in submitting to them the question of confirming your appointment."

13. Certain Correspondence thereupon took place between the Board of Trade and the said John Jenkins in which the said John Jenkins declined to withdraw from the Trusteeship in the said Bankruptcy.

14. In the opinion of the Board of Trade one of the duties of the Trustee in this Bankruptcy would be to inquire into the whole of the dealings of the said John Jenkins with the Bankrupt's Estate, and to enforce the rendering of a full Account of all such dealings and of payment of all monies due from the said John Jenkins under such an Account.

15. The Board of Trade are of opinion upon the construction of Section 21 (2) of the Bankruptcy Act 1883, that where the person appointed by the Creditors to fill the Office of Trustee of the property of the Bankrupt is a person who has dealt with the Estate of the Bankrupt with notice of an available act of Bankruptcy and where there is reasonable ground for believing that such person is accountable to the Trustee in the Bankruptcy in respect of such dealings the connection of such person with and his relation to the Estate of the Bankrupt makes it difficult for him to act with impartiality in the interests of the Creditors generally.

The Board of Trade are satisfied upon the facts in this matter (a) That the said John Jenkins has dealt with the Estate of the Bankrupt with notice of the act of Bankruptcy on which the Debtor was adjudged bankrupt.

(b) That there is reasonable ground for believing that the said John Jenkins is accountable to the Trustee in the Bankruptcy for his said dealings with the Estate of the Bankrupt and that the

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MARTIN,  
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said John Jenkins has failed to account fully to the Trustee of the property of the Bankrupt in respect of his said dealings although properly requested to do so.

(c) That there is ground for believing that the said John Jenkins has in his hands moneys forming part of the property of the said Bankrupt which he has failed to pay to the existing Trustee and that the question whether this is so or not can only be ascertained by an investigation to be instituted by some other independent trustee.

Dated the 12th day of April 1888.

An affidavit in answer to the above Report of the Board of Trade was made by the said John Jenkins as follows :—

1. In the month of August last the above Frederick Martin, then carrying on business in Cardiff aforesaid as a builder, and also to a very small extent, and in a small shop managed by his wife, that of a stationer, found himself in difficulties, and consulted his principal creditors in Cardiff.

2. In consequence thereof Messrs. Alexander & Co., timber merchants, creditors for 384*l.* 18*s.* 11*d.*, called an informal meeting of the debtor's creditors, which was held at their office on August 16th, 1887.

3. It was resolved at that meeting that the firm in which I was a partner, being chartered accountants, should investigate the affairs of the debtor, and should report to a subsequent meeting of the creditors.

4. My firm did accordingly carefully and fully investigate the affairs of the said debtor, and prepared statements, and a report thereon, and submitted such statements and report to a meeting of the whole creditors of the said debtor duly convened, and held at my office on August 31st, 1887.

5. The total secured and unsecured liabilities of the said debtor in respect of his said business of a builder amounted to 23,055*l.* 4*s.* 11*d.*, and the total liabilities of the said stationery business amounted to 66*l.* 18*s.*

6. At a meeting of creditors, held on September 19th, 1887,



after full discussion, it was unanimously resolved that the debtor should execute a deed of assignment to me as trustee for the benefit of the creditors generally.

7. The deed of assignment was accordingly prepared and executed by the debtor at or about October 1st last, and such deed was assented to in writing or otherwise by every unsecured creditor of the debtor, whose claim exceeded 10*l.*, except the petitioning creditor in this matter, whose claim was for 57*l.* 14*s.* 2*d.*, and arose solely in respect of the said stationery business.

8. In pursuance of the trust reposed in me by the said deed, I took possession of the debtor's estate, and dealt with it in the manner which I in my discretion considered best for the interest of the creditors generally.

9. Upon the presentation of the bankruptcy petition herein I at once ceased to deal with the estate, and upon the application to me by the official receiver I prepared a statement of account showing the whole of my dealings with the said estate from the date of my appointment as trustee under the said deed, and sent it to the official receiver, together with the cheque for the balance remaining in my hands.

10. In such account I made no deduction for or in respect of my disbursements or remuneration under the said deed, except that I retained two sums of 9*d.* and 11*d.* respectively, being the cost of two telegrams I had despatched to persons who had delayed returning the deed of assignment.

11. The only other item charged against the estate in the said account was the sum of 10*l.*, which sum I was instructed by the debtor to pay, and did pay, to his solicitors, Messrs. *Morgan & Scott*, of Cardiff aforesaid, being their costs of attending and opposing the said bankruptcy petition. This sum was required by them before they would act upon the debtor's instructions to oppose the said petition.

12. I have received no other sum on behalf of the bankrupt or his creditors under the said deed, but my said firm received the sums of 5*l.* and 6*l.* 5*s.* for rent of some property of the debtor of which before the execution of the said deed of assignment he had appointed us collectors. These sums were received before the execution of the deed, namely, on August 29th and September 3rd,

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and were applied, with the approval of the debtor, towards the expenses of the investigation aforesaid.

13. In addition, with the consent of the creditors' committee, I caused one of the debtor's houses to be put up for sale by auction, and the same was purchased at a very advantageous price, which would have materially benefited the estate, but as the statutory period of three months from the date of the execution of the said deed had not elapsed, I was advised by the solicitors acting in the matter to insert a condition in the conditions of sale reserving the right of rescinding the purchase upon returning the deposit if a bankruptcy petition was presented. This right I was advised to exercise after the making of the receiving order herein, and I did exercise it, and the deposit was repaid to the purchaser.

14. The total secured liabilities of the bankrupt according to the statutory statement amount to a sum of 19,536*l.* 5*s.*, and the total unsecured liabilities of the bankrupt amounted to 2767*l.* 17*s.* 8*d.*; and at the first statutory meeting of creditors there were present or represented unsecured creditors to the amount of 2095*l.* 12*s.* 6*d.*, of whom all, save the petitioning creditor aforesaid, who proved for 63*l.* 8*s.* 10*d.*, supported my nomination as trustee; and the statement in the 7th paragraph of the said report that creditors to the amount of 227*l.* 19*s.* 3*d.* voted against my appointment is incorrect.

15. Of the above amount of 2095*l.* 12*s.* 6*d.* present or represented at the meeting as aforesaid the official receiver himself held proxies to the amount of 164*l.* 10*s.* 5*d.*, and at the said meeting, at which I was present, the official receiver himself stated that it was so manifestly the wish of the vast majority of creditors that I should be appointed trustee that he would himself vote in my favour on his said proxies, and he did so.

16. It was the unanimous desire of every creditor of the bankrupt, except the petitioning creditor, that I should be appointed trustee in accordance with the said resolution, and the reason for this desire was that they were satisfied with the investigation made prior to the deed of assignment, and were of opinion that my firm having made such investigation, and so become fully acquainted with the whole of the debtor's affairs, I should more easily, expeditiously, and cheaply realise the estate to the best advantage than the official receiver or any other trustee could do. The only assets

in the estate of any value are a large number of equities of redemption in leasehold properties in Cardiff, and the only way to deal with them to the advantage of the creditors will be to exercise the greatest watchfulness over each property and take advantage of every opportunity as it offers itself for the advantageous disposal of any one or more of such properties. Such constant and discriminating attention to the estate as this necessitates cannot be given and cannot be reasonably expected from the official receiver, who has to look after the affairs of many scores of estates besides this one, and I verily believe, speaking from upwards of fifteen years' experience in bankruptcy matters, that if I am appointed trustee there are great probabilities that I shall be able so to deal with the properties as to obtain a dividend for the creditors.

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*Sir Edward Clarke, Q.C.*, Solicitor General (*Muir Mackenzie* with him): for the Board of Trade.

The Board of Trade have a very troublesome duty to perform where they feel bound to interfere with the choice of the creditors in respect of a trustee, and the Court will not overrule their objection unless it is quite clear that there is no ground for the suggestion made. The case of *In re Games, Ex parte the Board of Trade* (see *ante*, Vol. I., p. 216), in which a question of this kind was previously decided, is distinguishable from the present case. The objection was not the same. Where there are circumstances from which it might be inferred that the trustee cannot act with impartiality a discretion is given to the Board of Trade, and this Court will not go into the particular facts which have caused the Board of Trade to come to the conclusion to which they have. Here the difficulty of acting with impartiality is clearly established. There is a dispute as to sums received, &c., and the questions in dispute would have to be decided as between the trustee in the bankruptcy and the assignee under the deed, who in this case is the same person.

*Herbert Reed*: for the trustee.

The objection of the Board of Trade really amounts to this, that any trustee under a creditors' deed who may be supposed to be an accounting party cannot be appointed trustee under the bankruptcy.

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MARTIN,  
EX PART  
THE BOARD  
OF TRADE.

There is no suggestion that Mr. *Jenkins* is not a perfectly respectable person. If there was the slightest imputation that he was an improper person there might be some ground for the objection. The affidavit shows that he is much more likely to make the most of the estate than anyone else. There is not the slightest suggestion that if it is found that any moneys in dispute ought to be paid over he will not do so. Even if he refused to do so, there is plenty of machinery to make the trustee under the deed pay over anything that may be owing. He has knowledge of the estate, and is already trusted by the creditors.

CAVE, J. :

Judgment.

This is a question which arises under section 21 of the Act, which enables the Board of Trade to make objection to the appointment of trustees, and which enacts that if requested by a majority in value of the creditors they are to notify the objection to the High Court, and that thereupon the High Court may decide upon its validity. Now, in the first instance, I take it that that requires the High Court to enter into an investigation, not only of the objection itself, but of the grounds on which the objection rests, and that if the objection is not one which is authorised to be taken by the Act the High Court must disallow the objection. Also that if the objection is one which is authorised to be taken by the Act, but is one which is not founded upon any valid ground or upon any facts that can reasonably be held to support it, there also the High Court must hold the objection invalid and give judgment accordingly.

That being the jurisdiction in my judgment vested in the High Court, the question is how it ought to exercise it in this case. Sub-section (2) of section 21 requires that the Board of Trade shall certify that the appointment of the trustee "has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor makes it difficult for him to act with impartiality in the interests of the creditors generally." Now the objection which is taken here is the third of these

objections, namely, that the connection of this trustee with or his relation to the bankrupt or his estate makes it difficult for him to act with impartiality in the interests of the creditors generally. It is not easy to lay down any general rule, because this is a question of fact with regard to which it is, to my mind, impossible to lay down any very accurate general rule. Every case must depend more or less upon the circumstances of the case, and having regard to the expressions in the Act, one must see whether the facts are such as to lead to the conclusion that the trustee's connection with or relation to the bankrupt or his estate makes it difficult for him to act with impartiality.

Now the connection of the trustee with the bankrupt or his estate, which is objected to in this case is that Mr. Jenkins was appointed on October 1st, 1887, the assignee of the estate of the debtor under a deed by which the estate was to be divided amongst the creditors. Undoubtedly that was an act of bankruptcy, and might be treated as such by any dissentient creditor, and therefore it has been laid down that it was the duty of every person to treat it as an act of bankruptcy, and not to act upon it in any way or shape until at least the statutory period had arrived, after which it could not be impugned as being such an act of bankruptcy. Unfortunately in this case the trustee did not adopt that course, but in several instances he acted as if no act of bankruptcy had been committed, and consequently by so acting he has raised divers questions between himself and the estate which will have to be decided. The question I have to decide is whether by so doing he has made it difficult for himself to act with impartiality in the matter.

It is always difficult, as it seems to me, for a man to decide between his duty and his interests; that is acknowledged upon all hands. With regard to courts of justice, take one instance, no judge, however high or however low, however important or however unimportant the case he may be called upon to decide, is permitted to act in deciding the matter if he has got any pecuniary interest, however small, in the result of his judgment. What is the case with reference to Mr. Jenkins? Has he made it difficult to act with impartiality? To my mind he has clearly done so, because he has put himself in the position in which he will have to decide

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between his own interests and the claims of the creditors. It is no answer to say that machinery exists by which, if he goes wrong, he may be forced back into the right road. The object of the statute is to avoid any such mischief in the outset, and to enable the Board of Trade to object to the appointment where the circumstances make it difficult for him to act with impartiality. Now here we have a very strong proof, as it seems to me, of this difficulty, because certainly in more than one instance, as far as I am able to judge at present, the contests between the interests and the duty of the trustee have prevented him acting with impartiality.

I have not to decide whether the sums of money that he claims to retain against the estate are rightly retained by him or not, but certainly upon such an application as this, where he has retained sums of money and has decided these questions in his own favour and against the estate, one would have expected that the most ample explanation would have been forthcoming, in order to show, that if it was difficult for him to act with impartiality, he had at all events surmounted that difficulty in the cases which had already come before him; I cannot, however, find that he has done so. There is a sum of 10*l.* which he says, at the request of the debtor, he paid to his solicitors as the costs of opposing the petition. Now that sum appears to have been paid after the act of bankruptcy had been committed, and in order to enable the debtor to oppose the petitioning creditor, the petition being founded upon the execution of that very deed. Undoubtedly it was his duty, being aware of the act of bankruptcy, to refuse to deal with any money in his hands belonging to the bankrupt until it appeared whether or not the money still continued to remain the money of the bankrupt, because when that deed was executed there was an act of bankruptcy, and the money might turn out to be the money of the trustee and not the money of the bankrupt. Whether he acted rightly or not in this particular instance, as I have said, it is not for me to decide on this particular application; all I can say is, that, having to decide between himself and the estate, he has not satisfied me on this occasion that he acted with impartiality.

There are also two sums that the trustee had in his hands, amounting to 11*l.* 5*s.*, belonging originally to the debtor, received, it is true, before October 1st, 1887, the date of the deed, but when

dealt with it does not at all appear. It does appear that at some time or other, Mr. Jenkins applied those two sums in payment of the costs of the investigation, that is to say, the investigation which had been made by his firm; he has paid that amount to his firm, and he has altogether omitted to state the important date on which the payments were made. Those payments may be justified or they may not be justified, and whether they are justified or not he has not given me the opportunity of being able to decide. All I can tell is that in another question arising between himself and the estate he has not enabled me to say that he has exercised strict impartiality, and therefore beyond proof that it was difficult for him to do it, there is very grave reason to suspect that he has failed to do it.

There is another matter which obviously will come on for discussion at some time or other, and, for all I know, there may be others. Although it was his duty, as I have said, to wait until the expiration of the statutory period before dealing with an estate, his title to which might turn out to be invalid, he nevertheless proceeded to deal with that estate, and he incurred costs of putting up a portion of the property for sale.

Those questions will have to be dealt with at some time or other. His interests will lead him to decide in favour of paying those expenses to himself. His duty to the creditors ought to draw him in the other direction. Consequently there again there will be a conflict between his interests and his duty, the very thing which it is contemplated by this section ought not to happen, and the possibility of the happening of which is a thoroughly good ground for the interference of the Board of Trade.

I say nothing about another question which may possibly also arise in time, and that is the temptation he will be under from time to time of showing by the result that it would have been better to the creditors if the deed of October 1st had been allowed to stand, and that a larger dividend would have been realised under that deed than under the bankruptcy. I can say nothing about that, although it is obvious that there again there is some danger, and some ground for thinking that, unless Mr. Jenkins is a man of somewhat unusual virtue, he may be placed in a position of some little difficulty between his own—I will not say his pecuniary—

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interest but possibly his reputation as a person skilled in acting as an assignee under a deed of bankruptcy when he is relieved from the inspection of the Board of Trade and his powers where he has to submit and to render an account to the Board of Trade.

I only desire to add a few words with reference to a paragraph that has been quoted from my judgment in the case of *In re Games, Ex parte the Board of Trade* (see *ante*, Vol. I., p. 216). There was a similar application under a similar part of section 21, except that in that case the objection was not on the ground of the connection of the trustee with or relation to the bankrupt or his estate, but that his connection with or relation to a particular creditor (that was the brother of the bankrupt) made it difficult for him to act with impartiality. Now when that case came to be examined into, there was absolutely nothing to be said against the appointment of the trustee, except that he had been nominated by the brother who was a very large creditor, there was nothing to show that he was under any obligation to the brother, that he was in any sense any more likely than anybody else to decide in favour of the brother, or that the fact that he was simply proposed by the brother would in any way render it difficult for him to decide the case as between the conflicting claims of the different creditors. In the report, however, of that case there is a paragraph which has been referred to by the Solicitor General, and which is in these terms:—"It is in fact intended there shall be opposition, but there must be a dereliction of duty—the person appointed must be unfit—before the Board of Trade can interfere." Now I have no doubt I said something of that kind which is to be found there, but I confess at this present moment I can put no sensible interpretation upon these words, and I do not know what they mean. In my judgment, in future that case should be read as if that sentence was not contained in the report.

Upon these grounds which I have stated I think the objection made by the Board of Trade has been fully borne out in this inquiry, and consequently that it must be sustained.

*Objection sustained accordingly.*



Solicitors: *The Solicitor to the Board of Trade*, for the Board of Trade.

*O. B. Wooler*, for the trustee.

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Case referred to:—

*In re Games, Ex parte the Board of Trade, see ante, Vol. I.  
p. 216.*

# IN RE DES VIGNES, EX PARTE DES VIGNES.

*Bankruptcy Act, 1883, section 37.*

*Proof—Rejection by Trustee—Statute of Limitations—Conduct of Creditor—Costs.*

BEFORE  
MR. JUSTICE  
CAVE,  
1888.  
April 25th.

A proof in respect of money lent tendered against the estate by the father of the bankrupt was rejected by the trustee on the ground that no notice of the alleged debt appeared in the bankrupt's books of account, and that in any event it was barred by the Statute of Limitations.

*Held:* That by reason of a letter written by the bankrupt to his father four years previous to the bankruptcy, in which the debt was acknowledged, the Statute of Limitations did not apply; and that upon the evidence before it, the Court would not be justified in saying that the claim of the father was not a *bona fide* one.

But that the Court could not be insensible to the fact that the difficulty which had arisen was in great measure due to the conduct of the creditor himself in allowing his debt to remain without formal acknowledgment or entry in the books, by reason of which the trustee had been compelled to come to the Court in the course of his duty; and that although an order would be made allowing the proof, such order must be without costs, the trustee to take his costs out of the estate.

THIS was an appeal on behalf of the father of the bankrupt against the rejection by the trustee in the bankruptcy of a proof for 1400*l.*

1888. The proof in question was composed of five sums of money  
IN RE which it was alleged had been advanced by the creditor to his son  
DES VIGNES, on different occasions as loans. It was objected by the trustee that  
EX PARTE the whole of the sums were barred by the Statute of Limitations,  
DES VIGNES. the alleged loans having been made previous to 1882, more than  
six years before the bankruptcy; that they did not appear in the  
bankrupt's books; and moreover, that the item of 100*l.*, being the  
last of the five sums above mentioned, was clearly proved to have  
been not a loan but a gift.

An affidavit was filed by the father in support of his proof in  
which he stated that the whole of the sums were advanced as loans,  
and that he had complained that no notice in respect of them  
appeared in the accounts, in consequence of which the son, on  
October 23rd, 1888, wrote to him a letter in which he admitted  
the debt, and promised that the claim should be put down in the  
balance sheet.

*Ringwood* : for the creditor.

The letter of October 23rd, 1888, in which the bankrupt admits  
the debt, is an answer to the objection of the trustee so far as  
it relates to the Statute of Limitations. The only evidence in  
support of the objection that the last item of 100*l.* was a gift and  
not a loan is to be found in an answer of the bankrupt's mother on  
examination, in which she speaks of it under the term "gift."  
The father has sworn that it was a loan just as the others were  
loans.

*F. C. Willis* : for the trustee.

The trustee has had great difficulty in getting at any facts at all  
in the case. None of the alleged sums appear in the debtor's  
books. From investigation it would seem that the father drew  
cheques and got notes for them and gave the notes to the son.  
Not one single cheque ever passed through the hands of the debtor,  
except one for 80*l.*, and that was made out to a Mr. *Chapman*, who  
was the clerk, in order that the bankers might not know of the trans-  
action. The case depends wholly on the statement of the father.  
It is said that the letter of October 23rd, 1888, admits the debt,  
but I submit that it is not such a letter as will take the case out of

the Statute of Limitations. The last paragraph seems to be the most important where the debtor says, "Anyone would think you were a stranger and not my father, and that I had a rotten business. I will accept the bills as you suggest, and your claim shall be put down in the balance sheet." But no bills were given, and no amount was put down. What I say is this, that that letter was collusive, and was not such an admission as is necessary to take the case out of the statute. The last item of 100*l.* was clearly a gift, and has been spoken of as such. It was given in December, 1880, to enable the debtor to pay for his defence at the Old Bailey, where he was charged with running down a boat on the Thames.

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IN RE  
DES VIGNES,  
EX PARTE  
DES VIGNES.

CAVE, J. :

In this case I am of opinion that the appeal must be allowed. Judgment. There are only five items which are in dispute, and as to these the question is as to all of them whether the Statute of Limitations applies ; and further, as to the fifth item, whether it was a loan or a gift. Now, with reference to the Statute of Limitations, a letter of October, 1883, has been produced, and when you come to look at that letter it does, in my opinion, amount to an admission of the existence of the debt. Looking at it altogether, I cannot help thinking that it was such an acknowledgment of the debt as to take it out of the statute. Then as to the 100*l.* which is said to have been a present and not a loan. It is to be noticed that in the letter in question it is written as a loan. It is said, however, that on examination it was spoken of on one occasion as a gift. But it is often loosely said that money is given when it is not intended to be a present. By the word "giving" the person does not mean that the money was a gift, but he uses it as an indifferent word for gift or loan. The letter which speaks of it as a loan was in 1883, and the bankruptcy was not until four years after. I think, therefore, that I ought to allow the appeal. But I am not insensible to the difficulty which has been caused by the creditor allowing the matter to be so managed as to compel the trustee to come to the Court in the course of his duty. It is unreasonable to allow so large a sum to remain due without any acknowledgment except such as was given by the letter of October, 1883, and the creditor

1888. allowed the matter to go on without the debt being entered in the  
 IN RE books. I will not say that the claim is not a *bond fide* one, but  
 DES VIGNES, under the circumstances the appellant must pay his own costs.  
 EX PARTE  
 DES VIGNES. The trustee may take his costs out of the estate.

*Appeal allowed.*

Solicitors : *C. P. Deane*, for the creditor.

*Burn & Berridge*, for the trustee.

## PRACTICE.

BEFORE  
 MR. JUSTICE  
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### IN RE BOND & BOND, EX PARTE THE OFFICIAL RECEIVER.

*Bankruptcy Act, 1883, section 97, sub-section (3), and section 8.*

*April 26th  
 and 27th.*

*Special Case—Husband and wife not trading jointly or in partnership—Joint  
 Petition — Separate Receiving Orders — Objection of Board of Trade —  
 Amendment.*

On February 11th 1888 a receiving order was made against a husband and wife jointly on their joint petition, but on discovery by the official receiver that the debtors had not traded jointly or in partnership, the joint receiving order was, on February 23rd 1888, rescinded and separate receiving orders and orders of adjudication were made against each of the debtors individually.

An objection was taken by the Board of Trade to the insertion in the *Gazette* of two receiving orders against two persons not being in partnership and petitioning the Court under one petition ; and on March 15th 1888 an application was made by the official receiver to the Court to rescind the receiving order and adjudication against the husband, it being shown that he had no assets, and had acted only as manager in the wife's business.

*Held* : (1) That the official receiver, either as official receiver or as trustee, had *locus standi* to apply to the Court to have the receiving order and adjudication against the husband rescinded.

(2) That the Court had power to rescind the receiving order and adjudication ; and that it was the duty of the Court under the circumstances to do so, and to amend the petition by striking out the husband's name.

THIS was a Special Case stated by the learned Judge of the Birmingham County Court under section 97, sub-section (3), of the Bankruptcy Act 1883, in the following form :—

"In the matter of John Bond and Claire Phillippine Bond, of Parkfield Brickworks, Bordesley Green, Birmingham, and of Denbigh Street, Birmingham, in the County of Warwick, brick-makers (trading as C. P. Bond & Co.), the said John Bond, lately residing at Coventry Road, Smallheath, Birmingham, and carrying on business at Water Lane and Keeling Street, Birmingham, as a brickmaker.

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1. A receiving order was made on February, 11th, 1888, against the above named debtors jointly on their own joint petition.

2. The receiving order was advertised in the *London Gazette*, on February 14th, 1888.

3. The official receiver, after having examined the debtors, ascertained that the debtors were husband and wife, and had not traded jointly or in partnership.

4. The fact was brought under the notice of the learned registrar, and on February 23rd, 1888, the said registrar ordered the description to be amended as follows :—John Bond and Claire Phillippine Bond, now residing at Denbigh Street, Bordesley Green, Birmingham, in the county of Warwick, the said Claire Phillippine Bond carrying on business as a brickmaker at Parkfield Brickworks, Bordesley Green Road, Birmingham aforesaid, in the name of C. P. Bond & Co., the said John Bond being employed in the said business as manager for the said Claire Phillippine Bond, and the said John Bond, previously residing at Coventry Road, Smallheath, Birmingham aforesaid, and whilst there carrying on business at Water Lane and Keeling Street, Birmingham aforesaid, as a brick-maker, . . . and set aside the joint receiving order made on February 11th, 1888, and proceeded to make separate receiving orders and orders of adjudication against each of the debtors individually.

5. The advertisements of the amended receiving orders and adjudications were forwarded in due course to the Board of Trade for insertion in the *London Gazette*, but objection was taken by the Board to the insertion of two receiving orders against two persons not being in partnership and petitioning the Court under one petition.

6. A statement of affairs has been filed by each of the debtors. It appears by those statements that there are no joint assets or liabilities, and that the debtor, John Bond, has no assets at all.

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7. It appears from investigations made by the official receiver that the debtor John Bond had been formerly in business as a brickmaker. That he became insolvent, and on September 7th, 1885, he executed a deed of assignment for the benefit of his creditors, under which Mr. E. M. Sharpe was appointed trustee. The said trustee sold to the debtor, Mrs. Claire Phillippine Bond, the wife of the debtor John Bond, the whole of the assets belonging to the said John Bond. Mrs. Bond continued the business, employing the said John Bond as manager, and paying him a weekly salary. The stamp on the petition, &c., was paid out of the effects of Mrs. Claire Phillippine Bond.

8. On March 15th, 1888, the official receiver, under an application for directions, applied to the Court for directions under Rule 388, and contended that the receiving order and adjudication against the debtor John Bond should be rescinded, inasmuch as he obtained the protection of the Court through misrepresentation, and that the result of the adjudication would be that the expenses connected with his bankruptcy would fall entirely on the estate of Mrs. Claire Phillippine Bond. The debtors were served with notice but did not appear.

Having regard to the imperative terms of section 8 of the Bankruptcy Act, 1883, I doubted whether the Court had any power to make any such order, and as the case is one of general importance I have referred it, &c.

The questions for the opinion of the Court are:—

(1.) Whether the official receiver, either as official receiver or as trustee, has any *locus standi* to apply to have an adjudication or a receiving order rescinded under the above circumstances.

(2.) Whether the Court has any power to rescind a receiving order and adjudication and dismiss the petition against an admittedly insolvent debtor, and if so, whether in the present case the receiving order and adjudication ought to be rescinded and the petition dismissed, or what other order ought to be made."

*Muir Mackenzie* : for the official receiver, stated the case.

CAVE, J. :

Judgment.

This is a case which was stated by the Judge of the County

Court of Birmingham, pursuant to section 97, at the request of the official receiver.

The facts are simple. On February 11th, 1888, a receiving order was made against John Bond and Claire his wife upon a joint petition presented by the two. On February 14th the receiving order was duly advertised. On February 22nd it was discovered by the official receiver that the petitioners were a man and his wife, but that they had not traded jointly or in partnership, and thereupon, on February 23rd, the petition was amended to that effect, and the joint receiving order was set aside and a separate receiving order was made against each of the debtors and also separate adjudications. The Board of Trade objected to the two receiving orders being made upon a joint petition where there was no joint trading and no joint partnership. In fact there were no joint assets, no joint liabilities, and John Bond had no assets at all. Under those circumstances, on March 15th, the official receiver applied to the Court that the receiving order and adjudication against John Bond should be rescinded, and I am of opinion (the Judge having stated those facts for my opinion) that the application should be granted.

The questions which presented themselves to the learned Judge as questions of importance were two:—first, whether the official receiver, either as official receiver or as trustee, had any *locus standi* to apply to have the adjudication or receiving order rescinded under the circumstances I have mentioned. Now I am of opinion that under the circumstances I have stated the official receiver, whether as official receiver or as trustee, in either capacity, had a *locus standi* to apply to the Court. As an official receiver and an officer therefore of the Board of Trade representing the Board of Trade, and having a duty to make known to the Court all matters that come to his knowledge relating to the bankruptcy, I think it was his duty to bring before the Court the fact that separate receiving orders had been obtained wrongly on a joint petition, and that in that way, as the learned registrar yesterday pointed out to me, the revenue had been deprived of a fee of 5*l.*, which would have had to have been paid if, as ought to have been done, there had been separate petitions instead of a joint petition. I am also of opinion that the official receiver had a *locus standi* as

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trustee as well, because as trustee he represents the interest of the creditors in the estate of the wife, and as representing their interests, it is his duty to see that the assets of that estate were not applied wrongly in paying the expenses of the bankruptcy of the husband John. Inasmuch as there was a joint petition, there was a danger that the assets might be applied in payment of the expenses of John's bankruptcy; and under those circumstances in my judgment the trustee was not bound to wait until any order of the kind had actually been made, but it was his duty to apply at once to the Court, in order that proper steps might be taken at the outset to prevent those expenses being incurred at all.

Now the second point upon which the learned Judge desires my opinion is whether there is power to rescind a receiving order, having regard to the language of section 8 of the Act. Section 8 of the Act is in these terms:—"A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court shall thereupon make a receiving order." Now with regard to that undoubtedly it is the imperative duty of the Court to make a receiving order where the petition is a proper petition; but where the petition is, as it is in this case, an abuse of the process of the Court by joining two debtors who ought not to be joined, it thereby tends to deprive the revenue of a fee which ought to be paid, and it has for its object the payment of the expenses of a debtor with no assets out of the assets of a debtor who has assets. Under those circumstances I am clearly of opinion that the Court had power to refuse to make the receiving order, and when the receiving order was wrongfully made to rescind it. In point of fact the registrar here did rescind the joint receiving order, and made a separate receiving order against each of the debtors. I think what he ought to have done was this, he should have rescinded the joint receiving order and made a separate receiving order against the wife, and a separate adjudication against the wife; and with regard to John Bond, he ought to have directed the petition to be amended by striking out John Bond's name, and all reference to John Bond as an insolvent debtor, and to have turned the petition into what it really was, a petition on behalf of the wife alone, out of whose



pocket the whole of the costs of the petition up to that time had been paid. By that means there would have been a perfectly good receiving order and adjudication against the wife, and Bond would have been left to take such steps as he might have been advised to take—to file his own separate petition if he thought fit to, but to do it out of his own assets, and not out of the assets of the wife's estate.

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I therefore answer the questions put to the Court, that the official receiver had a *locus standi*; and that the Court had power to rescind the receiving order and adjudication against John Bond, and that it was the duty of the Court to do so, and amend the petition in the way I have pointed out.

Solicitors :—*The Solicitor to the Board of Trade*, for the official receiver.

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## PRACTICE.

DIVISIONAL  
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BEFORE  
CAYE, J.  
AND  
A. L. SMITH, J.  
1888.

May 8th.

IN RE MAUGHAN, EX PARTE MAUGHAN.

*Bankruptcy Act, 1883, section 105, sub-section (1), and section 107.*

*Order of County Court Registrar—Review by Judge—Jurisdiction—Substitution of Petitioning Creditors.*

The meaning of section 104, sub-section (1) of the Bankruptcy Act, 1883, is that where a Court having bankruptcy jurisdiction makes an order in bankruptcy, the same Court may review, rescind or vary such order; but no right is given to a County Court Judge to review, rescind or vary an order in bankruptcy which has been made by the registrar of such County Court.

On September 17th 1887 a bankruptcy petition was presented against the debtor, the act of bankruptcy alleged being the execution on July 7th 1887, of a deed of assignment for the benefit of his creditors generally, but on October 11th 1887 this petition was dismissed by the County Court registrar on the ground that the petitioning creditors, by assenting to the said deed, had precluded themselves from relying upon it as an act of bankruptcy.

On January 7th 1888 an order was made by the County Court Judge rescinding the registrar's order by which he dismissed the petition, and substituting other creditors who had not assented to the deed as petitioning creditors under section 107 of the Bankruptcy Act, 1883.

*Held:* (1) That the County Court Judge had no power to review or rescind the order made by the registrar.

(2) That under the circumstances the order made by the County Court Judge substituting other creditors as petitioning creditors was not warranted by any section of the Bankruptcy Act.

(3) That even if jurisdiction had been given to the County Court Judge to make the order he did, he ought not, on the facts of the case, to have made such order.

THIS was an appeal from an order of the Judge of the County Court at Hull, by which he rescinded an order made by the registrar of the said County Court dismissing a bankruptcy petition against the debtor and substituted the names of other creditors as petitioning creditors in such petition under section 107 of the Bankruptcy Act, 1883.

On July 7th 1887 a deed of assignment for the distribution of his estate amongst the creditors was executed by the debtor *Maughan*, who traded as a jeweller and silversmith at Beverley,

and who had been seized with an attack of paralysis which rendered him totally incapable of carrying on his business.

To this deed Messrs. *Walker & Hall* creditors to the extent of 100*l.* refused assent, and in consequence of threatened proceedings on their part, a bankruptcy petition was on September 17th 1887 presented against the debtor by Messrs. *Beckett & Co.* creditors who had assented to the deed, the solicitor acting in the matter having overlooked the fact that by such assent the creditor had precluded himself from relying on the deed as an act of bankruptcy.

On October 11th 1887 this petition was dismissed by the County Court Registrar, the three months during which the deed could be relied upon as an act of bankruptcy having expired on October 7th, but on December 5th motion was made by Messrs. *Walker & Hall* to the County Court and on January 7th 1888 an order was made by the Judge rescinding the Registrar's order of October 11th by which he dismissed the petition, and substituting Messrs. *Walker & Hall* for Messrs. *Beckett & Co.* as petitioning creditors.

From that order the debtor and all the creditors with the exception of Messrs. *Walker & Hall* now appealed.

*Sir R. Webster, Q.C.*, Attorney-General (*Yate Lee* with him):  
for the debtor.

The County Court Judge professes to have acted under section 107 of the Bankruptcy Act 1883 which provides that "Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor." But there was no power to make the order after the petition had been dismissed and here there are no facts to justify the substitution even if there was jurisdiction. Messrs. *Walker & Hall* knew of the deed the whole time and with full knowledge of it they allowed the three months to go by. They declined to assent to the deed simply in order that they might enforce payment of their debt in full, they having no preference. On July 15th 1887 they issued a writ in order to force payment, and their object throughout is obvious. The Judge could only act under section 107 on the ground that the petition was not proceeded on with due diligence. Here there was no want of diligence.

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There is no power to make a bad petition good, and at any rate the new petitioner did not come forward until after the three months had expired.

*Herbert Reed* : for Messrs. Walker & Hall.

Messrs. *Walker & Hall* are not trying to get a preference. From the first they said that unless their money was paid they would throw the estate into bankruptcy. When a person presents a petition he does so for the benefit of all the creditors, and not for his own benefit. It cannot be withdrawn and the creditor has a right to a receiving order even though all the other creditors may desire an arrangement. On September 17th 1887 when Messrs. *Walker & Hall* were threatening proceedings a letter was written to them by the solicitor stating that a petition had been presented on that day. The obvious intention was to lead them to infer that it was a debtor's petition and they were thus deceived. The County Court Judge said that in his opinion Messrs. *Walker & Hall* thought that it was a petition by the debtor. They were prepared to file a petition when in consequence of that letter of September 17th they did not do so. The County Court Judge said that in his opinion the petition was presented in order to stave off another petition. It was not put in honestly at all. The only steps which could be taken when the real truth was discovered were then taken. If a man cannot get 20s. in the pound he is entitled to proceed to bankruptcy and he is not to be prevented by reason of any private arrangement of the other creditors whatever (Counsel referred to *Ex parte Harris*, *In re Ash*, L. R. 1 Ch. App. 469 : 35 L. J. Bank. 21 : 14 L. T. 611 : 14 W. R. 750 ; *In re Bristow*, L. R. 3 Ch. App. 247 : 37 L. J. Bank. 9 : 18 L. T. 222 : 16 W. R. 385).

[CAVE, J.—Where do you find the right of the County Court Judge to rescind this order of the Registrar ?]

Under section 104 of the Bankruptcy Act 1883 which provides by sub-section (1) that "Every Court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction."

[CAVE, J.—This order was made by the Registrar and what right had the Judge to rescind it?]

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The section says every "Court." For example, the High Court in Bankruptcy exercises jurisdiction in London by the Judge and by the Registrars, but no order is said to be made by the Judge or by the Registrar, it is made by "the Court."

CAVE, J. :

I am of opinion that the appeal must be allowed. In the case of Judgment. this bankruptcy there had been a petition presented on September 17th 1887. That petition was dismissed on October 11th by the Registrar, and on December 5th a motion was made by the present respondents to rescind that order and to substitute them as petitioners. The order asked for was made by the County Court Judge and this is an appeal from that order. Now I am of opinion in the first place that the Judge had no authority at all to make the order he did; and in the second place that if he had authority he ought not to have exercised it. As to the first point, the order dismissing the petition was made by the Registrar. The application to rescind was made to the Judge. There was no right to apply to the Judge to rescind the order of the Registrar any more than there would be a right to apply to the Registrar to rescind an order of the Judge. The Judge and the Registrar have each their duties to perform and a person who makes the order has power to rehear and rescind it. The duties are as a rule distinct and to allow one to rehear and rescind the order of another, as for example the Judge to rehear an order of the Registrar, would be to give a right of appeal which does not exist. Further I am of opinion that the order made is not warranted by any section in the Bankruptcy Act. Section 107 provides that "Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor." Now in this case the petition had actually been dismissed on October 11th and at that time no one could present a petition founded on the deed as an act of bankruptcy—the three months had elapsed,—and the effect of

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what has been done is to extend the time for filing a petition on such an act of bankruptcy as that. In my opinion that cannot be done. You might as well say that if a creditor came four or six months after a deed had been executed and said that he had been misled—that he was under the impression there was a petition,—and now asked that the time during which the deed could be relied upon as an act of bankruptcy might be extended, such an application ought to be granted. There would be no power to do so at any rate unless some fraud could be shown, if then. If fraud were shown the Court would strain its jurisdiction to the utmost, but in the absence of fraud to say that the man was misled, and misled as in this case by some fact not being communicated which he could have found out for himself is certainly no ground for extending the time. Now as to the question whether even if the power to make the order did exist the County Court Judge ought to have exercised it in this case. On July 7th 1887 the debtor who had been incapacitated by paralysis executed the deed for the benefit of his creditors. No wrong was intended by the deed, and it seems to have been a fair and just one. On July 12th 1887 notice was given to Messrs. *Walker & Hall* of its execution and they were asked to assent. On the same day Messrs. *Beckett & Co.* assented. On July 15th Messrs. *Walker & Hall* issued a writ, and that was a most unjustifiable proceeding. It could not do the creditors or themselves any good and was pure waste of money. On July 23rd the deed had been executed by eleven of the creditors and it was sent to Messrs. *Walker & Hall* at their request but was returned unsigned. In all the proceedings they seem to have acted throughout for their own individual interests. Execution was issued by them and subsequently they wrote “We will file a petition unless our debt and costs is paid to the sheriff on Monday.” Their whole conduct is certainly not calculated to benefit the general body of creditors. On September 17th a bankruptcy petition was filed by Messrs. *Beckett & Co.* and notice was given to *Walker & Hall*. Now it is said that *Walker & Hall* believed that that petition was filed by the debtor, but no evidence has been given of that, and they could at once have found out whether such was the fact or not. On September 23rd it was discovered that the petition by Messrs. *Beckett & Co.* was a bad one and the

County Court Judge seems to be of opinion that the solicitor ought to have at once communicated that fact to *Walker & Hall*. I cannot see that. There is no evidence that *Walker & Hall* believed that the petition of September 17th was a debtor's petition and considering their conduct throughout, which was entirely for their own purposes, in my opinion the solicitor was not called upon to make known the fact to them. On October 11th the petition was dismissed and on October 12th *Walker & Hall* say that unless their debt is paid they will proceed with the petition. They never had an idea to benefit the general body of creditors but were solely for themselves. Even assuming therefore that there was power to substitute them as petitioners, have they shown good cause why they should be substituted? Looking at their whole course of conduct it would not in my opinion be right to assist creditors of that kind; and if it was a matter of discretion the County Court Judge ought not to have exercised his jurisdiction in their favour. But as I have said I do not think he had jurisdiction to hear the case at all; or if he had jurisdiction he had no power under section 107 of the Bankruptcy Act 1883 to make the order he did. The order of the County Court Judge was therefore wrong and must be reversed with costs.

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A. L. SMITH, J. :

I am of the same opinion. I will only add a word on the one point as to the right of the County Court Judge to rescind the order of the registrar. Section 104 says "Every Court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it, &c." I read that in this way. A County Court Judge makes an order, he can review and rescind it. My brother CAVE makes an order he can review and rescind it. We in banc I suppose the same. The Court of Appeal the same. The meaning is that the Court which makes the order, the same Court can review and vary it. But says Mr. Reed, How about the registrar? If we turn to section 168 we find "the Court" means the Court having jurisdiction in bankruptcy under this Act. Then by Rule 3 of the Bankruptcy Rules 1886 "the Court includes a registrar when exercising the powers of the Court pursuant to the Act or these rules." The registrar therefore is in the same

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position as the Court I have mentioned above. A Court may review and vary its own order, but one Court cannot alter the order of another.

*Appeal allowed with costs.*

Solicitors: *Collyer-Bristowe, Withers, Russell & Hill*, for the debtor.

*Steadman & Co.*, for Messrs. Walker & Hall.

## PRACTICE.

DIVISIONAL  
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BEFORE  
CAVE, J.  
AND  
A. L. SMITH, J.  
1888.  
May 14th.

IN RE SHURLY, EX PARTE SHURLY.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g).*

*Receiving Order made in County Court—Subsequent compromise—Application to Court of Appeal to rescind Receiving Order—Jurisdiction—Bankruptcy Notice—Judgment Debt—Right of Debtor to go behind Judgment.*

On March 3rd 1888 a receiving order was made in the County Court against a debtor who had failed to comply with the terms of a bankruptcy notice requiring him to pay a judgment debt, but a compromise having been subsequently agreed upon between the petitioning creditors and the debtor, application was made by the debtor, with the consent of the petitioning creditors, to the Divisional Court in Bankruptcy to rescind the receiving order on the terms of such compromise.

*Held*: That the Court had no jurisdiction to entertain such an application: and that the application was wrong in form.

But that under the circumstances the Court would allow the debtor to proceed with the case in the form of an appeal from the order of the County Court, it being alleged that the County Court registrar had wrongly refused to allow the debtor to go behind the judgment and enquire into the consideration of the judgment debt upon which the bankruptcy notice had been founded.

*Held*: That no facts had been brought to the notice of the County Court registrar which would afford any grounds for going behind the judgment; and that he was right in refusing to do so and in making the receiving order as prayed.

THIS was an appeal from a receiving order made against the debtor *Shurly*, in the County Court at Windsor, and asking that



the said receiving order might be rescinded on the terms of a compromise which had been agreed upon between the petitioning creditors and the debtor.

On November 28th 1887 judgment for the sum of 1200*l.* was obtained by the petitioning creditors as plaintiffs in an action against the debtor in the High Court.

No steps were taken by the debtor to set this judgment aside and on January 9th 1888 a bankruptcy notice under section 4 sub-section 1 (g) of the Bankruptcy Act 1883 was served upon him in respect of the debt, and on January 26th a petition was presented in the Windsor County Court.

On February 11th 1888 the petition came on for hearing but was adjourned until February 25th, and then further adjourned until March 3rd 1888, on which occasion the debtor was desirous of going behind the judgment of November 28th 1887 on which the petition was founded, on the ground—(1) that the said judgment was not warranted on the terms of an arrangement entered into previous to action brought; and (2) that he had been induced by fraud to give the guarantee on which the alleged debt had become due.

The County Court Registrar however, refused to allow this to be done and made a receiving order.

Negotiations were thereupon entered into between the debtor and the petitioning creditors which resulted in a compromise being arrived at and the debtor now applied to the Divisional Court in Bankruptcy to rescind the receiving order on the terms of this compromise.

*Kent* : for the debtor Shurly.

The petitioning creditors have agreed to a compromise and are willing that the receiving order should be rescinded.

[CAVE, J.—I cannot understand this. You can only appeal from the order of the Court below. You cannot ask us to rescind it in this way. The jurisdiction as to appeal, and as to rescinding an order is quite different.]

The ground of my application is that the receiving order was wrongly made.

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[CAVE, J.—You have stated no grounds of appeal.]

Then I ask leave to amend. I am prepared to meet the case and to show that the receiving order was wrongly made.

[CAVE, J.—It is quite clear that we cannot rescind this order on the ground of anything which has taken place since. We can in any case only allow you to treat this application as an appeal from the receiving order.]

The receiving order is wrong. The County Court registrar refused to hear any evidence as to whether the judgment on which the petition was founded was properly obtained or not. He did not exercise a judicial discretion. The debtor had a perfect right to go behind the judgment as is shown by *In re Lennox, Ex parte Lennox* (see *ante*, Vol. II. p. 271 : L. R. 16 Q. B. D. 815).

[*E. Cooper Willis, Q.C.*, as *amicus curiæ*, reminded the Court of *In re Lipscombe, Ex parte Lipscombe*, see *ante*, Vol. IV. p. 48 : and *In re Saville, Ex parte Saville*, see *ante*, Vol. IV. p. 277.]

CAVE, J. :

Judgment.

This appeal must be dismissed. In the first place the form in which it was brought is wrong. The application made to us was an application to rescind the receiving order made in the County Court, and we have no original jurisdiction to hear that application. We have, however, allowed the debtor to treat it as an appeal. He may apply to the County Court registrar to rescind the order made there if he thinks fit. We have nothing to do with that. We are only concerned with the appeal. Now the facts of the case are tolerably simple. In January 1887 the petitioning creditors contend that they were entitled to an instalment from the debtor which was not paid. The action came on for trial before Mr. Justice DENMAN on November 28th 1887 when a statement appears to have been made by the debtor that his witnesses were not present. An application for an adjournment, however, was refused by the Court. The case was taken and ultimately judgment was given for the petitioning creditors for 1200*l*. After that

judgment no attempt was made by the debtor to set the judgment aside. He could move to set aside the judgment and apply for a new trial, and he did not do so. On January 9th, 1888, a bankruptcy notice was served, and was not complied with. No steps were taken by the debtor whatever to have the bankruptcy notice set aside or to give security or anything of the kind, and on January 26th a petition was presented. On February 11th the case came on for hearing, but was adjourned until February 25th, and nothing was then said as to any objection to the judgment. The hearing was still further adjourned until March 3rd, on which date it came before the registrar, and the debtor then attempted to go behind the judgment of November 28th, 1887, on the ground—(1) that the judgment was not warranted on the terms of an arrangement entered into previous to January, 1877; and (2) that he had been induced to enter into the guarantee by fraud. Now in the first place he is precluded from that defence because he did not raise it either at the trial, or make any application to set aside the judgment, and it is obvious that he could not apply to set it aside on March 3rd. In the second place, the alleged ground of fraud was perfectly frivolous. In my judgment none of the things stated to the registrar afforded any grounds for going behind the judgment at all. It is now suggested that since the receiving order an arrangement has been made, and if so, that may be a ground for an application to the registrar to rescind the order. As to that I say nothing. But it certainly affords no ground for setting aside a receiving order on appeal. The matters have happened subsequently, and we cannot deal with them.

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A. L. SMITH, J. :

I am of the same opinion. I have nothing to add.

*Appeal dismissed.*

## PRACTICE.

BEFORE  
MR. JUSTICE  
CAVE.  
1888.  
April 27th.

IN RE WILLIAMS, EX PARTE WILLIAMS.

*Bankruptcy (Discharge and Closure) Act 1887, sections 2 and 8, and Rules 8 and 25.*

*Bankruptcy Act 1883, section 104, sub-section (2).*

BEFORE  
CAVE, J.  
AND  
A. L. SMITH, J.  
1888.  
May 15th.

*Application for discharge by debtor who has presented liquidation petition under the Bankruptcy Act 1869—Conditional discharge—Appeal by Debtor—Right of Appeal—Appeal to what Court.*

It would seem that an order made in the County Court under the Bankruptcy (Discharge and Closure) Act, 1887, being an order made in a bankruptcy matter, there is a right of appeal from such order even though no right of appeal is expressly given by the Act itself.

Also that in such case the appeal will lie to the Divisional Court in Bankruptcy.

THIS was an appeal on behalf of the debtor against an order made in the County Court under the Bankruptcy (Discharge and Closure) Act 1887 granting to the said debtor his discharge only upon certain conditions.

*E. Cooper Willis, Q.C. (Walton with him):* for the debtor.

*Herbert Reed:* for the respondents.

*April 27th.*

*Herbert Reed:*

I have a preliminary objection. The Bankruptcy (Discharge and Closure) Act gives no right of appeal by the Act itself. Rule 25 of the general rules made for carrying into effect the objects of the Act provides:—"The rules for the time being in force in relation to appeals in bankruptcy matters, shall so far as applicable apply to appeals from orders made under the Act." But that alone cannot give the right. Under the Act of 1869 the creditors would grant a discharge and the intention was to give the Judge discretion to grant a discharge in their place.

*E. Cooper Willis, Q.C.:*

If the argument of my friend is correct, an action for damages ought certainly to lie against the Lord Chancellor and the Board

of Trade for putting out misleading rules. It is quite clear that their view of the case was that there was a right of appeal. It is not however at all clear whether that right is to your Lordship alone as under the Bankruptcy Act 1869 or to the Divisional Court in Bankruptcy which is the Court of Appeal under the present Act. If I may say so my own impression is that the appeal lies to the Divisional Court.

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CAVE, J. :

Under the circumstances I think the case had better stand over until I am next sitting in a Divisional Court, when at any rate I shall have the advantage of the assistance of one of the other learned judges.

*May 15th.*

On this day the case came on again for hearing before Mr. Justice CAVE and Mr. Justice A. L. SMITH sitting as a Divisional Court in bankruptcy.

*E. Cooper Willis, Q.C. :*

The appeal is against an order regulating the discharge of the debtor under old liquidation proceedings. On a former occasion I ventured to say that in my opinion the proper Court of Appeal was the Divisional Court. I must, however, first make out that I have any right of appeal at all. The case is under the Bankruptcy (Discharge and Closure) Act 1887. That Act is an Act to amend the law relating to the discharge of bankrupts and the closure of bankruptcy proceedings, and section 2 provides that "A debtor who has been adjudged bankrupt, or whose affairs have been liquidated by arrangement under the Bankruptcy Act 1869, or any previous Bankruptcy Act, and who has not obtained his discharge, may apply to the Court for an order of discharge, and thereupon the Court shall appoint a day for hearing the application in open Court." Notice of such hearing must be sent by the debtor to each creditor who has proved; and on the hearing "the Court may hear any creditor, and may put such questions to the debtor and receive such evidence as the Court thinks fit, and on being satisfied that the notice required by this section has been duly sent and

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published, may either grant or refuse the order of discharge or suspend the operation of the order for a specified time, or grant the order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the debtor." And "A discharge granted under this section shall have the same effect as if it had been granted in pursuance of the Act under which the debtor was adjudged bankrupt or liquidated his affairs by arrangement." There is no reference in the Act to any right of appeal at all. But by section 8 "General rules for carrying into effect the objects of this Act may from time to time be made," and by Rule 8 "The order of the Court made on an application for a discharge under the Act shall not be delivered out or notice thereof gazetted until after the expiration of the time limited for appeal, or if an appeal be entered until after the decision of the Court of Appeal thereon." While by Rule 25 "The rules for the time being in force in relation to appeals in bankruptcy matters, shall so far as applicable apply to appeals from orders made under the Act." That shows that the persons who made the rules thought there was a right of appeal. Under the old Bankruptcy Act the discharge was only granted by the creditors. Under the Act of 1888 the debtor against whom a receiving order has been made comes and applies for his discharge; and every order made by the Court is subject to an appeal. By section 71 of the Bankruptcy Act 1869 the appeal was from an order made "in pursuance of this Act." Now by section 104, sub-section (2) of the Bankruptcy Act 1888, "Orders in bankruptcy matters" are subject to appeal. Clearly this is an order in bankruptcy. By section 2 of the Act of 1887 a debtor who wishes to apply for his discharge must apply "to the Court having jurisdiction in bankruptcy." Then "orders in bankruptcy matters shall be subject to appeal." So it is really unnecessary to give a right of appeal in so many words, when there is an appeal from orders in bankruptcy.

[A. L. SMITH, J.—That would seem so.]

There seems to be an exactly similar state of affairs in Admiralty matters. In Maxwell on Statutes at p. 159, it is said "A recent enactment has been considered as granting jurisdiction by impli-

cation in a remarkable manner. The 31 & 32 Vict. c. 71, after reciting that it was desirable that some County Courts should have Admiralty jurisdiction, and authorising the Queen in Council to confer such jurisdiction on any of those Courts, empowered them to try certain classes of cases over which the Court of Admiralty had jurisdiction; directing the Judge to transfer any case to the Admiralty Court when the amount claimed exceeded 300*l.*, and giving also to the latter Court in all cases not only an appeal, but power to transfer to itself any suit instituted in the lower Court. By a supplementary Act passed in the following session (32 & 33 Vict. c. 51) the County Courts on which Admiralty jurisdiction had been thus conferred were further authorised to try any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship when the claim does not exceed 300*l.* The Court of Admiralty had no jurisdiction over these cases before the Act was passed, but it followed that in thus giving the County Court this jurisdiction the Statute also gave by mere implication to the Admiralty Court not only appellate but original jurisdiction also; besides introducing the anomaly of dealing with small cases on different principles of law from large ones, while the apparent object of the enactments was merely to distribute the existing Admiralty jurisdiction." See *The Alina*, L. R. 5 Ex. Div. 227.

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WILLIAMS,  
EX PARTE  
WILLIAMS.

*Herbert Reed :*

I do not propose to raise any point as an objection to your Lordships hearing the appeal. I am quite willing and would prefer that the case should be heard on the merits.

Cave, J. :

I think we had better hear the case on the merits.

A. L. SMITH, J., concurred.

*The appeal was then heard upon the merits and was dismissed.*

Solicitors: *Barrell, Rodway & Co.*, for the debtor.

*Burton, Yeates & Co.*, for the respondent.

## PRACTICE.

DIVISIONAL  
COURT.BEFORE  
CAVE, J.,  
AND  
A. L. SMITH, J.  
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May 15th.

IN RE BURDEN, EX PARTE WOOD.

*Bankruptcy Act 1883, section 149 sub-section (2), and section 163.**Debtor's Petition—Application by creditor for order directing prosecution—Offences within four months next "before" petition—Debtors Act 1869 (32 & 33 Vict. c. 62), section 11, sub-sections 13, 14, 15.*

*Held:* That where the bankruptcy petition has been presented by the bankrupt himself, the Court has no power to order the prosecution of such bankrupt for offences alleged to have been committed by him under section 11 sub-sections 13, 14, and 15, of the Debtors Act 1869, within four months next before the presentation of such petition.

The said sub-sections only make the acts therein specified criminal offences if done by the debtor "within four months next before the presentation of a bankruptcy petition against him;" and they are not extended by section 163 sub-section (1) of the Bankruptcy Act 1883, by which only the words "if after the presentation of a bankruptcy petition by or against him" are substituted for the words "if after the presentation of a bankruptcy petition against him."

THIS was an appeal by a creditor of the bankrupt against an order of the learned Judge of the Canterbury County Court refusing to direct that the said bankrupt be prosecuted for offences committed by him within the meaning of section 11 sub-sections 13, 14, and 15 of the Debtors Act 1869.

The application in the County Court was supported by a representation in writing by the applicant and verified by affidavit of himself and another creditor, the said application being made under section 16 of the Debtors Act 1869, the offences alleged being those specified in sub-sections 13, 14, and 15 of section 11 of the same Act. If an order had been made the public prosecutor would have conducted the prosecution in pursuance of section 166 of the Bankruptcy Act 1883.

Section 11 of the Debtors Act 1869 provides:—

"Any person adjudged bankrupt, and any person whose affairs



are liquidated by arrangement in pursuance of the Bankruptcy Act 1869, shall, in each of the cases following, be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years with or without hard labour; that is to say . . .

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13. If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same.

14. If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud.

15. If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, pawns, pledges or disposes of otherwise than in the ordinary way of his trade any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud."

By section 149 of the Bankruptcy Act 1883 sub-section (2), "Where by any Act or instrument, reference is made to the Bankruptcy Act 1869, the Act or instrument shall be construed and have effect as if reference was made therein to the corresponding provisions of this Act."

And by section 163 sub-section (1), "Sections eleven and twelve of the Debtors Act 1869, relating to the punishment of fraudulent debtors and imposing a penalty for absconding with property, shall have effect as if there were substituted therein for the words 'if after the presentation of a bankruptcy petition against him' the words 'if after the presentation of a bankruptcy petition by or against him.'"

In refusing the application the learned County Court Judge made

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the following note :—“ Application refused, Court being of opinion that the case is not brought within sub-sections 13, 14, and 15 of section 11 of the Debtors Act 1869, as those sub-sections only make the Acts therein criminal offences if done by the debtor ‘*within four months next before the presentation of a bankruptcy petition against him,*’ whereas here the petition was not presented *against* him, but *by* him : and that these sub-sections are not extended by the Bankruptcy Act 1883 section 163 to the case of a bankrupt presenting a petition against himself inasmuch as sub-section (1) of section 163 only substitutes the words ‘*after the presentation of a bankruptcy petition by or against him*’ for the words ‘*after the presentation of a bankruptcy petition against him,*’ and does not alter the words in sub-sections 13, 14, and 15 *before* the presentation of a petition against him to *before* the presentation of a petition by or against him.

Court inclining to the opinion but not deciding that a sufficient *prima facie* case would otherwise be shown for directing a prosecution, having regard to the cases of *Ex parte Stallard* (L. R. 3 Ch. App. 408), *Ex parte Brett* (L. R. 1 Ch. Div. 151), and *Ex parte Marsden* (L. R. 2 Ch. Div. 786), cited and the judgments therein as to what conduct is within the Act and on what evidence the Court should act in directing a prosecution.”

From this refusal the creditor now appealed.

*Morton Smith* : for the creditor.

The question simply is whether the bankrupt is relieved from danger where he has presented his own petition. The question I think is really covered by the case of *In re Walker, Ex parte Gould* (see *ante*, Vol. I. p. 168 : L. R. 13 Q. B. D. 454 : 51 L. T. 368). In that case “ A lease of a mill and warehouse made October 1st, 1880, for twenty-one years, contained the following covenants and provisoes :—‘ That in case the said lessees shall during the said term be bankrupts, or file a petition in liquidation, or make an assignment for the benefit of their creditors, then the said term hereby created shall cease : That on the determination or cesser of the said term the machinery-room, warehouse, and chimney shall be and remain the property of the company ; but

all the machinery, and also all the other buildings, erected by the lessees, shall be their property, and shall be removed by them previously to the determination or cesser of the said term, unless it shall be then mutually agreed by the said company and the lessees that the company shall purchase them. The said lessees, in case the same shall be removed, shall make good all damage which may be caused in their removal: That the several articles and things mentioned in the schedule hereto (consisting of iron columns and beams in boiler-room, wood floor in oil-mill, and other articles) shall be the property of the lessees, and shall be removable by them, the said lessees making good all damage done by such removal.' In March, 1884, the lessees presented a bankruptcy petition under the Bankruptcy Act 1883, upon which a receiving order was made. It was held that the lessees had taken such steps under the Bankruptcy Act, as having regard to the provisions of the new Act, and to section 149 of it, would justify the lessors in saying that the clause of forfeiture applied, and that consequently the presentation of the petition by the lessees caused a cesser of the term under that proviso."

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[CAVE, J. The creditor can himself prosecute if he wishes.]

Yes; but where the Court orders the prosecution the Public Prosecutor carries on the matter.

[CAVE, J. The effect of that in my experience would be that the prosecution would fail. I have not very much confidence in a prosecution by the Public Prosecutor in such a matter as this after what I have seen.]

I can only submit that the County Court Judge had power to direct the prosecution, notwithstanding the mode in which section 163 of the Bankruptcy Act 1883 has been drawn.

CAVE, J. :

I am of opinion that the County Court Judge was right in Judgment, refusing the application. The question is one of some little difficulty, but looking at it and forming the best opinion I can, I have come to the conclusion that what the debtor has done is not an

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offence within the Act. By section 11 of the Debtors Act 1869 it is provided that "Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act 1869 shall, in each of the cases following, be deemed guilty of a misdemeanour, \* \* \* (18) If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same." Now under the Act then in force, viz.:—the Bankruptcy Act 1869, a bankruptcy petition could only be presented by a creditor and not by a debtor, and if a debtor wished to take advantage of the Act he presented a liquidation petition. Then came the statute of 1883 which made large alterations in bankruptcy proceedings; which swept away liquidations and made the petition a starting point in case both of the creditor and of the debtor. One form is substituted; a bankruptcy petition is presented either by the creditor or by the debtor himself. The result of that is that the words of sub-section 18 of section 11 of the Debtors Act 1869 no longer expressly apply. A petition is now presented "by" him, and there is no longer any liquidation. But section 149 of the Bankruptcy Act 1883 has been relied upon to get over that difficulty. That section provides that "Where by any Act or instrument, reference is made to the Bankruptcy Act 1869, the Act or instrument shall be construed and have effect as if reference was made therein to the corresponding provisions of this Act." Now that section received an interpretation in *In re Walker, Ex parte Gould* (see *ante*, Vol. I. p. 168), and I adhere to the view I expressed in that case, viz.:—that where there is reference in a lease to the Act of 1869, the lease is to be construed as if the reference was to the corresponding provisions of the present Act of 1883. I still abide by that. But even if matters stood there, there would still arise a difficulty, and that difficulty would arise from the well known maxim that you cannot make a man a criminal by inference. There must be a clear expression in the Act of Parliament, and it cannot be done merely by inference. That would cause me to hesitate whether the legislature intended section 149 to apply to the Debtors Act 1869 which creates offences. But when I turn to section 163 any doubts I might have are not only

strengthened but made certain and confirmed. Section 163 sub-section (1) enacts that "Sections eleven and twelve of the Debtors Act 1869 relating to the punishment of fraudulent debtors and imposing a penalty for absconding with property, shall have effect as if there were substituted therein for the words 'if after the presentation of a bankruptcy petition against him' the words 'if after the presentation of a bankruptcy petition by or against him.'" It follows from that section that the legislature had before it sections 11 and 12 of the Debtors Act 1869, and I cannot suppose that they were ignorant that under section 11 there were certain acts which were offences if they were done "before" the presentation of a bankruptcy petition against him, and yet having the whole section before their eyes the legislature restricted itself to offences "after" the presentation of a bankruptcy petition. So whatever I might be inclined to decide if section 149 stood alone, when I find that section 163 omits very important words and that the legislature has expressly confined itself to acts "after" the presentation of a petition, I must take it that it did not intend to include acts "before" the presentation of a petition. I must take the words as I find them. It may be a *casus omissus*, but with that I have nothing to do, and I can only arrive at the conclusion that where the offence is before the presentation of the petition, and the petition is by the debtor himself, the case is not provided for by the Act and a prosecution cannot be ordered.

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A. L. SMITH, J. :

I have come to the same conclusion. I must confess I had some doubt, but I think what my brother CAVE has said is right. We are dealing with a criminal case and we must see that the case comes within the words of the statute. Sub-section 13 of section 11 of the Debtors Act 1869 says "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, &c." This man is not within the words "within four months next before the presentation of a bankruptcy petition against him." The petition was presented by him. "Or the commencement of the liquidation." He is not within that. But it is said that by reason of section 149 of the Bankruptcy Act 1883 the commencement of the liquidation means

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the same thing as a petition of a bankrupt by himself, and according to *In re Walker, Ex parte Gould* (see ante Vol. I. p. 168) that would seem to be so. But as my brother CAVE has pointed out, I am met by section 168. When the legislature was dealing with section 168 it was dealing with two sections of the Debtors Act. The Debtors Act was before them, and they take care to say the sections shall have effect as if there were substituted therein for the words "if after the presentation of a bankruptcy petition against him" the words "if after the presentation of a bankruptcy petition by or against him." That is, they include all the clauses of section 11 down to sub-section 12, and purposely leave unamended sub-sections 13, 14, and 15. It is argued that that is a blunder. But I cannot say that, and in my opinion the decision of the County Court Judge was right.

*Appeal dismissed.*

Solicitors : *Smith & Hayward*, for the creditor.

Case relied upon:—

*In re Walker, Ex parte Gould*, see ante Vol. I. p. 168 : L. R.  
13 Q. B. D. 454 : 51 L. T. 368.

**PRACTICE.****IN RE WHICHER, EX PARTE STEVENS & ANOTHER.**DIVISIONAL  
COURT.BEFORE  
CAYE, J.AND  
A. L. SMITH, J.  
1888.*Bankruptcy Act 1883, section 27.**Discovery of debtor's property—Application to examine Trustee—Alleged misconduct in sale of bankrupt's property—Costs.*May 10th and  
17th.

The property of the bankrupt consisting of a certain mill was sold by the trustee to the bankrupt's brother for the sum of 1100*l.*, being sufficient to pay all the creditors whose names were set out in the statement of affairs, and of whom notice had been received, their debts in full.

After the assets had been distributed the fact of the bankruptcy was ascertained by a creditor for 396*l.*, whose name the bankrupt had failed to insert in his statement, and it being admitted that a better price might probably have been obtained for the property sold than that actually realised, application was made to the Court by such creditor under section 27 of the Bankruptcy Act 1883, for an order for the examination of the trustee, the bankrupt, and his brother in respect of the sale proceedings.

*Held:* That the creditor was entitled to make such application; and that an order ought to be made by the Court directing the examination of the bankrupt and his brother.

But that in the absence of any evidence of *mala fides* or collusion there was nothing to justify the Court in making an order against the trustee.

Where application is made under section 27 of the Bankruptcy Act 1883, for the examination of a trustee in bankruptcy, it would seem that notice of such application should be served on the trustee.

**T**HIS was an appeal by the executors of a creditor of the bankrupt from the refusal of the registrar of the County Court at Poole to issue a summons for the examination of the bankrupt, his brother, and the trustee in the bankruptcy under section 27 of the Bankruptcy Act 1883.

In May 1887 the debtor *Whicher*, who was at that time indebted to one *Deane* in the sum of 896*l.*, filed his own petition. The debtor did not, however, insert *Deane* as a creditor in his statement of affairs, and it was alleged that he knew nothing of the bankruptcy proceedings.

Subsequently to the petition *Deane* died, his will being proved by the executors, who became aware of the bankruptcy and communicated with the trustee therein in respect of the debt.

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It was then discovered that certain property consisting of a mill belonging to the bankrupt had been sold to the bankrupt's brother *T. C. Whicher* by the trustee for a sum of 1100*l.*, which was sufficient to pay all the creditors of whom notice had been given 20*s.* in the pound, and these assets had been distributed.

It was admitted that if the said property had been publicly advertised for sale by auction a better price might have been realised, but as the offer made by the bankrupt's brother was sufficient to pay the creditors set out in the statement of affairs their debts in full, this was not done.

The executors thereupon proved their debt and applied to the trustee to examine the bankrupt's brother with respect to the sale, which was refused.

Application was then made to the County Court registrar for the examination of the trustee, the bankrupt and his brother with regard to the sale proceedings, which was also refused, and from that refusal the executors now appealed.

*Hansell* (*Herbert Reed* with him): for the executors.

The sale on the admission of the trustee did not realise the best price, and we say that the bankrupt's brother knew well that *Deane's* debt was purposely omitted in order that the mill might be kept in the family. The registrar did not give any reasons for his refusal, but so far as can be gathered he appears to have thought (1) that section 27 did not apply so as to enable creditors to make the application: and (2) that it did not apply so as to include an examination of the trustee. The case of *Ex parte Swift, In re Russell* (26 L. T. 226) has decided the first point where it was held that a creditor who makes a *prima facie* case for the examination of the bankrupt, or any other person, might apply for his examination under the corresponding section 96 of the Bankruptcy Act 1869 if the trustee is unwilling to do so, subject to the risk of having to pay the costs. And as to the second point the case of *Ex parte Crossley, In re Taylor* (L. R. 13 Eq. 409: 41 L. J. Bank. 85: 20 W. R. 400) decided that the right extends to the examination of the trustee himself.

[CAVE, J. Have you served the trustee with notice of this application?]



No. The practice has been to make the application *ex parte*, and if the Court thinks that the trustee should be served it will direct it.

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CAVE, J.:

You are asking us to overrule a decision of the registrar in the dark. I am altogether opposed to *ex parte* applications of this kind where there is anyone who can give us information on the matter brought before us. It is not as if you only wished to examine the debtor and his brother. But here you wish to examine the trustee who is in a very different position. What you are really doing is to raise an imputation against him. We certainly shall not make any order, and the only thing we can do is to let the matter stand over for you to give notice to the trustee and in order that the real reasons of the County Court registrar for his refusal may be put before us.

May 17th.

*Herbert Reed* (*Hansell* with him): for the executors.

Notice has now been given to the trustee of this application and the registrar has submitted his reasons for refusal to your Lordships. They are (1) that the application could not be made by a creditor; and (2) that he had no evidence to show that the examination would be of any benefit to the estate. The first reason is clearly wrong, and the second is now put forward for the first time and is not supported by the evidence. I do not for one moment suggest that the trustee was guilty of *mala fides*. But it is essential for us to ascertain whether there was a contract and what the contract was. The evidence shows that the property was worth 200*l.* more than the brother gave. The debtor certainly knew of *Deane's* claim and all his explanation is that he thought *Deane* would not prove. 20*s.* in the pound has been paid, and ours is a provable debt. We cannot disturb the dividend already declared, and we are left without remedy unless we can prove that this sale was not warranted—that there was an arrangement between the bankrupt and his brother to get the estate by suppressing *Deane's* claim. I do not allege misconduct against the trustee, but I say he has been wrong in law in selling for a less price than he might

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have got. We really think the trustee made an error of judgment in selling not for the best price. At the same time if your Lordships should be of opinion that the trustee should not at present be examined I will take an order against the bankrupt and his brother. They are the persons we really want.

*F. C. Willis* : for the trustee.

Under no circumstances is there authority for the examination of the trustee in the absence of *mala fides* on his part.

[CAVE, J. Mr. Reed has signified his willingness to take an order against the bankrupt and his brother first.]

The fact is that the action of these executors prevents the bankruptcy being closed and no order ought to be made. The receiving order was in May 1887, and it was not until November that there was any suggestion that *Deane* had any claim against the estate. The trustee before the sale advertised in the papers as he was required that all persons should bring in their claims and after that he felt safe. The debtor explains his reasons for not returning *Deane* in his list of creditors by the fact that they were always very great friends and it was never intended that *Deane* would make any claim. No claim was made until *Deane* died.

CAVE, J. :

Judgment.

This is an application for leave to examine the bankrupt, his brother, and the trustee ; and with regard to the trustee I may say at once that in my opinion no case has been made out to justify us in making any order against him. No doubt in a case where there was *prima facie* evidence of collusion it would be proper to make such an order, but there is no such thing here, and the application as to the trustee must be refused. As to the bankrupt and the brother the case stands on a different footing. The reasons given by the County Court registrar for his refusal are in the first place that he had no power to make the order—that the application could not be made by a creditor. Also now in answer to our request he says that he had no evidence to show that the examination would be of any benefit to the estate. Now I am not so

sure of that. When one comes to the facts it does seem a case for enquiry. The bankrupt presented his own petition in May 1887. He did not return Deane as a creditor, and there is no explanation of that. The estate was sold for sufficient to pay the other creditors 20s. in the pound, and it is certainly unusual to find a man becoming bankrupt on his own petition when he can pay 20s. in the pound. The more natural course would be one would think to take a mortgage of the estate, and for the brother in this case to have advanced the money. But it is obvious that if that were done Deane's debt would not be got rid of. By bankruptcy Deane's debt was got rid of and so I think some enquiry is justified. We have heard no evidence at all that Deane forgave the debt. He might do so if he wished, but we have had no evidence of it. There is evidence, however, that in November 1887 he put the matter into the hands of somebody to collect the debt for him, the sale having taken place in September, and he dying in December. The executors are doing the best they can to recover the debt and I think they ought to receive assistance. The only other matter is as to the terms on which we ought to do this. The applicants must in my opinion pay the trustee's costs because they have shown no sufficient grounds for their application against him. As to the costs of the examination itself the applicants may take the costs out of the assets recovered if any are recovered. If no assets are recovered the applicants must bear their own costs because there is no fund out of which they can be taken. The order will be therefore directing the summons to issue against the bankrupt and his brother in the terms of the notice of motion.

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A. L. SMITH, J.:

I am of the same opinion. I have nothing to add.

*Order accordingly.*

Solicitors: *Lovell, Sons & Pitfield*, for the executors.

*Lee & Powning*, for the trustee.

Cases relied upon:—

*Ex parte Swift, In re Russell*, 26 L. T. 226.

*Ex parte Crossley, In re Taylor*, L. R. 13 Eq. 409: 41 L. J.

Bank. 35: 20 W. R. 400.

## PRACTICE.

BEFORE  
MR. JUSTICE  
CAVE.  
1888.

May 10th and  
June 1st.

## IN RE WHITAKER, EX PARTE THE TRUSTEE.

*Bankruptcy Act, 1883, section 55.*

*Scale of Fees and Percentages, Table A.*

*Application to Court—Exemption of Official Receiver from payment of prescribed fee—Disclaimer—Joinder of different respondents in one application.*

*Held:* (1) That the exemption of the official receiver from payment of the prescribed fee of 5s. on every application to the Court applies only where an application is made by him in his capacity of official receiver, and does not extend to cases where application is made to the Court by the official receiver as trustee in bankruptcy.

(2) That in an application to disclaim against one landlord, any number of mortgagees or sublessees who are interested in parts only of the property sought to be disclaimed may be joined; but that different landlords of separate and distinct estates cannot be joined as respondents to one application for leave to disclaim the aggregate property.

IN this case two questions were at the request of the trustee referred by the registrar to Mr. Justice CAVE for his decision.

The submission was as follows:—

“(1) Whether when the trustee making an application to the Court happens to be the official receiver he is exempted from the payment of the prescribed fee of 5s. (see Scale of Fees and Percentages Table A.) although he does not make the application in his capacity of official receiver but as trustee. Up to the present time the Court has required him to pay the fee.

The question is one of importance to the revenue, and the decision upon it will govern the practice not only in the London district, but in all the county districts.

(2.) May a trustee in making an application to disclaim property include in one application paper and one notice of motion any number of distinct and different properties and any number of distinct and different respondents, such as landlord, mortgagees, &c.; and use one affidavit dealing with all the distinct and different properties.

The question is of importance to the revenue, as if he may do

so, there would be only one 5s. stamp required, there being only one application. The question is also of importance as one of practice.

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WHITAKER,  
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THE TRUSTEE.

The practice hitherto has been to allow the trustee to include in one application any number of different properties, provided the persons to be served as parties interested are the same; but where the parties interested are different separate applications have been required, it having been found to cause great inconvenience to include different parties in one application, as they have to peruse a long affidavit, the very much greater portion of which has nothing whatever to do with them or their interests.

In this particular case and in some others now pending there is a very large number of different properties to be disclaimed, and in which the parties interested are different.

The decision of this question also will govern the practice in the country as well as in London."

*Sidney Woolf*: for the trustee.

This is a small bankruptcy, and under section 121 of the Act the official receiver is trustee. As to the first question I submit that it makes no difference whether the application is by the official receiver as trustee or as official receiver. He is still the official receiver.

[CAVE, J. The official receiver who pays this fee will take it out of the estate. Why should the country pay the fee in the case of a small bankruptcy?]

The words of the Scale of Fees are not limited. They are, "Every application to the Court, except by the official receiver, 5s." In all cases it was intended that the official receiver should be exempted from payment of the fee. (Counsel also referred to sections 16, 27, 54, 70 of the Bankruptcy Act 1883, and to Rules 332, 333, 334 of the Bankruptcy Rules 1886).

As to the second question; it applies to all trustees. Must there be a separate application to disclaim every lease? I submit that there is nothing to prevent one application being made to disclaim different properties.

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 WHITAKER,  
 EX PARTE  
 THE TRUSTEE.

*June 1st.*

CAVE, J. :

The first point I have to decide is whether the official receiver is exempt from the payment of the prescribed fee of 5s., where he makes the application as trustee, and not as official receiver.

Judgment.

Table A. of the Scale of Fees and Percentages contains the following :—"Every application to the Court, except by the official receiver, 5s." In my judgment the exemption only applies when the official receiver makes the application as official receiver, and not when he makes the application as trustee. There are I think good grounds for the distinction. Where the official receiver makes an application as trustee he is as a general rule in possession of the assets in the bankruptcy, and there seems no sufficient reason why a particular estate should be exempted from the fee when the application is made by the official receiver in his capacity as trustee, and be compelled to pay the fee when a similar application is made by a trustee appointed by the creditors. These fees are applied in paying the salaries of the officials and other expenses of working the Bankruptcy Act, and I can see no reason why a particular estate should be exempted from its share of the burden where an application is made by the official receiver in his capacity of trustee. It may be said that there are cases especially in the administration of small estates where there are no available assets for the payment of these fees. Such cases can only occur very seldom, and when they do occur the fees will in fact be payable out of the moneys applicable to paying the expenses of the Act which seems a far more reasonable course than that in all cases whether there are assets or not, an estate should be exempt from these fees so long as the official receiver was acting as trustee. Moreover, Rule 318, which was made at the time when the Table of Fees was sanctioned, provides that the trustee shall before the estate is handed over to him by the official receiver discharge any balance due to the official receiver on account of fees, costs, and charges properly incurred by him and payable under the Act. The words "except by the official receiver," appear to me to have a sufficient meaning given to them if they are confined to applications made by the official receiver to the Court as official receiver, such as applications under Rule 334 or under Rule 389 (4) or the like.

The second question is in effect, What is an application? Primarily an application connotes a respondent against whom the application is made and an application does not cease to be one because there are more respondents than one who are affected by the whole of the application. Nor do I think it ceases to be an application because there are respondents who are interested in part of the application only provided there is also a chief respondent who is interested in the whole. But when there is no longer any chief respondent who is interested in the whole application but only some respondents who are interested in one part and some who are interested in another part then I think the character of unity is gone and the application is no longer one. I answer, therefore, that so long as there is one chief respondent who is affected by the whole application, the application is one and one fee only is payable although there may be many other respondents some of whom are concerned as to part only and others as to other parts only but that as soon as there is no chief respondent who is sought to be affected by the whole of the application, then the application is double and should not be allowed to be made in that form.

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IN RE

 WHITAKER,  
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 THE TRUSTEE.

Apply this principle to an application to disclaim. I think the landlord is the chief respondent and that in an application against one landlord whether individual partners or company any number of mortgagees or sub-lessees who are interested in parts only of the property sought to be disclaimed may be joined; but that different landlords of separate and distinct estates cannot be joined as respondents to one application for leave to disclaim the aggregate property.

Solicitors: *Valpy, Chaplin & Peckham*, for the trustee.



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DIVISIONAL  
COURT.BEFORE  
CAVE, J.  
AND  
A. L. SMITH, J.  
1888.

May 15th.

IN RE McTEAR, EX PARTE McTEAR.

*Bankruptcy Act, 1883, section 23, and section 18, sub-section (6).**Composition or Scheme of Arrangement—Approval of Court—Wishes of Creditors  
—Conduct of Bankrupt.*

Where application is made to the Court to approve a composition or scheme, it is the duty of the Court to take into consideration not only the wishes of the creditors, but also the conduct of the debtor and the requirements of commercial morality.

In the case of a trader, the Court must look at the conduct of the debtor with reference to his trading; and where by such conduct it is clearly shown that the debtor is not a fit person to carry on business, the Court ought to refuse its approval.

Thus where a debtor carried on business and became bankrupt, paying no dividend, and after two years started in business again in a partnership into which he brought no capital, and failed, a dividend of 3s. 3d. in the pound being paid, and his discharge was absolutely refused for offences under the Bankruptcy Act; but such debtor subsequently offered, and the majority of the creditors accepted, a composition of one shilling in the pound, on payment of which the bankruptcy was to be annulled.

*Held:* That the Court was right in refusing to approve such composition.

THIS was an appeal from a decision of the learned judge of the Liverpool County Court refusing to approve a composition offered by the bankrupt *McTear* and accepted by the creditors under section 23 of the Bankruptcy Act 1883.

In March 1886 a receiving order was made against the firm of *McTear & Horrocks*, who carried on business as felt manufacturers, the said firm consisting of *McTear*, the present appellant, and one *T. E. Horrocks*.

The debtors were adjudicated bankrupt their liabilities being something like 6800*l.*, a dividend of 3s. 3d. in the pound being subsequently paid.

In June 1886 the bankrupts applied for their discharge under section 28 of the Bankruptcy Act 1883, when an order was made suspending the discharge of *Horrocks* for one year, while the discharge of *McTear* was refused absolutely, the official receiver



having reported that the said bankrupt had "continued to trade after knowing himself to be insolvent;" that he had "brought on his bankruptcy by rash and hazardous speculations;" and that he had also been guilty of "unjustifiable extravagance in living."

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It was further stated that in the year 1881 he had been bankrupt in Ireland his liabilities reaching 36,000*l.*, and no dividend being paid; and that he had brought nothing into the Liverpool firm, but had drawn 700*l.* out.

In November 1886 on a second application by *McTear*, his discharge was again refused and a subsequent application for a rehearing was also dismissed.

In 1888 an offer of a composition was made by *McTear* to the creditors in the following terms:—that 1*s.* in the pound on their debts should be paid, such composition to be in addition to the dividend of 3*s.* 3*d.* in the pound already declared and paid. The composition to be paid in cash on the approval of the Court being granted, the property to be revested in *McTear* who should pay all costs; and that on payment of the composition the bankruptcy be annulled.

This composition was accepted by the creditors under section 23 of the Bankruptcy Act 1883 which gives the power to accept a composition or scheme after bankruptcy adjudication.

On application to the County Court for its approval, however, the learned judge refused to approve the composition and from that refusal the bankrupt now appealed.

*Herbert Reed*: for the bankrupt.

The dividend of 3*s.* 3*d.* had been paid to the creditors, and the bankrupt had been two years undischarged when by the assistance of his friends he was enabled to make this offer of one shilling extra. The estate has been realised and everything has been got in, and the offer is certainly beneficial to the creditors and has been accepted by them. The question is not whether the bankrupt should be benefited but whether the creditors should be, and they will receive another shilling in the pound.

[A. L. SMITH, J.: In 1881 the bankrupt failed for a large amount and paid not a penny. He started again and again went bankrupt and the firm has paid 3*s.* 3*d.* in the pound. He now offers this

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 MCFAR.

shilling in the pound as a bribe to the creditors in order to be let loose on to the commercial world again.]

The previous bankruptcy was caused by circumstances over which the bankrupt had no control. If the scheme is not approved the creditors will be deprived of the extra benefit of the shilling: and the bankrupt will be made practically an outlaw for the rest of his life. The shilling and costs will come to about £400. The question really is whether when a man's discharge has been refused, can he offer the creditors a composition and so enable them to get more than they would otherwise get, and must he be prevented from ever going into business again? In *Ex parte Hudson, In re Walton* (L. R. 22 Ch. Div. 773; 47 L. T. 674) the Court of Appeal held that a shilling is better than nothing, and nothing more can be got here. This scheme ought to be accepted not for the sake of the debtor but for the creditors.

*Muir Mackenzie*: for the official receiver.

This is certainly not a case in which the Court will interfere with the decision of the County Court Judge. The bankrupt applied for his discharge and it was refused on account of the offences committed by him. He applied a second time and it was again refused. Then application for a rehearing was refused. This application is made under section 23 of the Bankruptcy Act 1883 which gives a power to accept a composition or scheme after bankruptcy adjudication and provides that "thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication." By section 18 sub-section (6) it is provided that " \* \* \* if any such facts are proved as would under this Act justify the Court in refusing, qualifying or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme." The question to be determined is the question of the conduct of the debtor. It is not a question of the wishes of the creditors but of the conduct of the debtor. In the case of *In re Wallace, Ex parte Campbell* (see *ante* Vol. II. p. 167: L. R. 15 Q. B. D. 213. 54 L. J. Q. B. 382: 53 L. T. 208) it was held "That it is no ground to set aside the decision of the registrar refusing to approve a composition because a large majority of the

creditors of a debtor are desirous of accepting it, but that the object of the Bankruptcy Act 1883 being to prevent reckless debtors from escaping the consequences of their conduct by the payment of a nominal dividend, it is the duty of the Court to protect such creditors from themselves." The same principle was also laid down in *In re Rogers, Ex parte Rogers* (see *ante* Vol. I. p. 159 : L. R. 18 Q. B. D. 488 : 33 W. R. 354) and *In re Young, Ex parte Young* (see *ante*, Vol. II. p. 37).

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CAVE, J :

I am of opinion that this appeal must be dismissed. It is in my Judgment. opinion a most extravagant appeal, and the Court would be doing very wrong if it acceded to it. The appeal is brought under section 23 of the Bankruptcy Act 1883 which enables creditors to entertain a proposal for a composition or scheme after the debtor has been adjudged bankrupt, and provides that "thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication." Now turn to section 18 which deals with a composition or scheme before adjudication, and we find by sub-section (6) that "if any such facts are proved as would under this Act justify the Court in refusing, qualifying or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme." In this case ample facts were proved. The Court refused the debtor his discharge. It remained in the discretion of the Court to refuse to approve the composition. The Court has a discretion, and we have to look not only at the wishes of the creditors, but at the requirements of commercial morality. The question is not only in respect of the creditors being likely to be benefited, but it is necessary to look at the conduct of the debtor with reference to trading to see if his conduct is such that the scheme should be approved of. Now what are the facts here. The bankrupt was a felt manufacturer. In 1881 he failed for 36,000*l.*, and no dividend was paid. It has been suggested to us that the majority of his creditors were secured. For two years he did nothing. In March 1884 he set up in business again, into which he brought no capital, but he had *Horrocks* as his partner, who put in first 1000*l.*, and subsequently another 2000*l.* In two

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years' trading he has incurred heavy debts, and the official receiver has reported that he continued to trade after knowing himself to be insolvent, and that he had brought on his bankruptcy by rash and hazardous speculations, and unjustifiable extravagance in living. And all these things are reported of a man who had traded and failed before. The result to the creditors was disastrous. They have been paid 9s. 3d. in the pound, and there is no reason to think that they can get more. The bankrupt applied three times for his discharge, and three times it has been rightly refused. How could the Court approve of this composition, the result of which must be that a person of these commercial antecedents will be turned loose on the world again.

A. L. SMITH, J. :

I am entirely of the same opinion.

Appeal dismissed, with costs.

Solicitors :—*Cheese & Green*, for the bankrupt.

The Solicitor to the Board of Trade, for the official receiver.

Cases relied upon or referred to :—

Ex parte Hudson, In re Walton, L. R. 22 Ch. D. 773 :
 47 L. T. 674.

In re Wallace, Ex parte Campbell, see *ante*, Vol. II. p. 167 :
 L. R. 15 Q. B. D. 213 : 54 L. J. Q. B. 382 : 53 L. T.
 208.

In re Rogers, Ex parte Rogers, see *ante*, Vol. I. p. 159 :
 L. R. 13 Q. B. D. 438 : 33 W. R. 354.

In re Young, Ex parte Young, see *ante*, Vol. I. p. 87.

PRACTICE.

IN RE PHILLIPS, EX PARTE PHILLIPS.

DIVISIONAL
COURT.*Bankruptcy Act, 1883, section 4, sub-section 1 (g).**Bankruptcy Rules 1886. Rule 130.*BEFORE
CAVE, J.,
AND
WILLS, J.
1888.
June 19th.*Bankruptcy Notice—Refusal of Court to set aside—Appeal—Time—Notice of Appeal—Length of Notice—Rules of the Supreme Court, Order LVIII., Rule 3.*

Notice of appeal from an order refusing to set aside a bankruptcy notice should be a fourteen days' notice.

Where such notice was not given, the Court directed the case to stand over to a certain day until the required time had elapsed, and notice to be given to the creditor that the Court had appointed such day for the hearing of the appeal.

THIS was an appeal from an order of the learned Judge of the County Court at East Stonehouse refusing to set aside a bankruptcy notice issued against the debtor.

E. Cooper Willis, Q.C. (F. C. Willis with him): for the debtor.

I see no one appears to-day on the other side and I think I ought to bring two facts to the notice of your Lordships even though they are against myself. In the first place the appeal is one day late. Rule 130 of the Bankruptcy Rules 1886 provides that "Subject to the powers of the Court of Appeal to extend the time under special circumstances, no appeal to the Court of Appeal from any order of the Court shall be brought after the expiration of twenty-one days. The said period shall be calculated from the time at which the order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal." We are one day late owing partly to an idea, I think, that the affair would be settled, and partly to some mistake about the drawing up of the order. As to that point, however, I ask the Court to exercise its powers and extend the time. But there is another question, viz., whether our notice of appeal is a proper notice. Notice was given about ten days ago. Order LVIII. of the Rules of the Supreme Court 1883 provides by Rule

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3 that "Notice of appeal from any judgment, whether final or interlocutory, or from a final order, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice." The question simply is whether an order refusing to set aside a bankruptcy notice is interlocutory or final. It seems to me that it is final on the question. (Counsel referred the Court to *In re Landau, Ex parte Brown & Wingrove*, see *ante*, Vol. IV. p. 253.)

CAVE, J. :

I think you ought to have given fourteen days' notice undoubtedly. The proper course for us to take will be to adjourn the case until next Saturday, and you must give notice to the creditor and to the registrar of the County Court that the Court has fixed that day for the hearing. Of course then you must be prepared with an affidavit as to the question of your appeal being out of time.

Solicitors : *C. Curtis*, for the debtor.

IN RE WILLIS, EX PARTE LADY WILLOUGHBY DE ERESBY. COURT OF APPEAL.

Mortgage deed—Attornment clause—Bankruptcy petition—Distress—Adjudication—Right to proceeds—Bills of Sale Act 1878 (41 & 42 Vict. c. 31) section 6.

BEFORE THE
MASTER OF
THE ROLLS,
LINDLEY, L.J.
LOPES, L.J.
1888.

June 8th.
and 28rd.

An indenture of mortgage contained a clause whereby the mortgagor attorned and became tenant from quarter to quarter to the mortgagee in respect of the premises at a yearly rent by equal quarterly payments, the first payment to be made on the first day of the month next after any interest thereby secured should have become in arrear, but all money received by the mortgagee for rent due under the attornment to be accepted in the first place in or towards satisfaction of the interest then in arrear: provided that the attornment should not make it compulsory on the mortgagee to collect the rent payable thereunder, and that she should not be accountable to a second mortgagee or any subsequent incumbrancer for any rent that might have been recovered under such attornment: and provided that the mortgagee might at any time after she was by law empowered to sell, enter upon and take possession of the premises and determine the tenancy.

A bankruptcy petition was subsequently presented against the mortgagor, upon which he was adjudicated bankrupt, but between the presentation of such petition and the adjudication the mortgagee distrained under the tenancy created by the attornment and realised the sum of 1715*l*.

Held (LORD ESHER, M.R., doubtful): That the clause in question fell within section 6 of the Bills of Sale Act 1878, but did not come within the proviso to the said section; and that the trustee in the bankruptcy was entitled to the money realised.

THIS was an appeal on behalf of Lady Willoughby de Eresby from an order of Mr. Justice CAVE directing her to repay to the trustee in the bankruptcy the value of certain goods sold under a distress made by her on the property of the bankrupt.

On January 28th 1884 the bankrupt, who was then the lessee of Willis's Rooms for a term of years in consideration of the loan of 20,000*l*., mortgaged those premises to Lady Willoughby de Eresby by way of sub-demise to secure the repayment of the said loan.

By the indenture of mortgage it was agreed that Lady Willoughby de Eresby or the persons claiming title under her might at any time without any further consent on the part of *Willis* or any other person, demise or enter into any agreement to demise the said premises or any part thereof on any terms she or they might think

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fit, provided that such power should not be exercised until such time as she or they were by law empowered to sell.

The indenture further witnessed that for the same consideration *Willis* thereby attorned and became tenant from quarter to quarter to Lady Willoughby de Eresby in respect of the premises at a yearly rent of 2000*l.* by equal quarterly payments, the first payment to be made on the first day of the month next after any interest thereby secured should have become in arrear, but all money received by Lady Willoughby de Eresby for rent due under the attornment should be accepted in the first place in or towards satisfaction of the interest then in arrear: provided that the attornment should not make it compulsory on Lady Willoughby de Eresby to collect the rent payable thereunder and that she should not be accountable to a second mortgagee or any subsequent incumbrancer for any rent that might have been recovered under such attornment; and provided that Lady Willoughby de Eresby might at any time after she was by law empowered to sell, without any notice enter upon and take possession of the premises and determine the last-mentioned tenancy.

On September 24th 1885 a bankruptcy petition was presented against *Willis*, the act of bankruptcy alleged being a failure to comply with the requirements of a bankruptcy notice of August 8th 1885, served on the debtor on September 4th 1885.

On November 20th 1885 a receiving order was made against *Willis*, and on January 26th 1886 he was adjudicated bankrupt.

In the meantime—viz., on November 7th 1885—Lady Willoughby de Eresby had distrained under the tenancy created by the attornment and had realised a sum of 1715*l.*

On April 26th 1888 application was made by the trustee in the bankruptcy to Mr. Justice CAVE for the repayment of this sum to him on the ground that the distress was unlawful by reason of section 6 of the Bills of Sale Act 1878, and his Lordship after consideration granted the application.

Mr. Justice CAVE in the course of his judgment said:—

The question I have to decide is whether this distress was unlawful by reason of section 6 of the Bills of Sale Act 1878. It is there enacted that “Every attornment instrument or agreement

not being a mining lease whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present future or contingent debt or advance and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance or otherwise for the purpose of such security only, shall be deemed to be a bill of sale within the meaning of this Act of any personal chattels which may be seized or taken under such power of distress: Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land tenement or hereditaments which the mortgagee being in possession shall have demised to the mortgagor as his tenant at a fair and reasonable rent." It was admitted at the trial that if the case fell within the section and not within the proviso the distress became by virtue of the Acts of 1878 and 1882 unlawful and the trustee was entitled to the money realised. The first contention on behalf of the respondent was that the case did not come within the section at all and in support of that proposition the case of *Hall v. Comfort* (L. R. 18 Q. B. D. 11) was strongly pressed upon me. In that case a mortgage deed contained a clause by which for the purpose of securing the punctual payment of the interest the mortgagor attorned tenant to the mortgagee and the mortgagee had a power of re-entry for default in payment. Default was made and the mortgagee commenced an action for the recovery of the premises and applied for judgment under Order XIV. Upon the hearing of the summons the defendant objected that the attornment clause was void under the Bills of Sale Acts so that no tenancy had in fact been created. The Court however held that the clause was not rendered void by those Acts. The actual decision has no bearing on this case; but it was contended that the reasoning by which it was arrived at is conclusive in favour of the respondent. In order to test that it is necessary to see what points were actually argued and decided in that case. For the defendants it was contended that as the attornment clause purported to create a tenancy to which a power of distress is incident and so gave power to seize personal chattels, it was in fact a bill of sale and so came within section 3 of the Act of 1878. It was also contended that it amounted to a license to take possession of personal chattels as security for a debt and so came within

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section 4. According to the report it was also contended that it came within section 6 but I cannot understand how that could be for no personal chattels had been seized or taken under the distress and there is nothing in that section to make the attornment itself void. THE LORD CHIEF JUSTICE held that the attornment clause was not within the Act, that it was not a bill of sale within section 3 nor a license to take possession of personal chattels as security for a debt within section 4 because it had not the character or incidents of a bill of sale properly so called and because if it were within those sections every lease would be within the Acts. That reasoning if I may respectfully say so is perfectly good but it applies obviously to sections 3 and 4 only for in the first place in section 6 it is expressly provided that an attornment &c. shall be *deemed* to be a bill of sale which implies that but for the section it would not have been one at all and makes it one for the purposes of that section only, and in the second place there is nothing in section 6 to bring an ordinary lease within the section and indeed there is an express exception of a mining lease which as an anomalous document amounting not to a demise but to a sale of the minerals might otherwise have been thought to have been within the Act. It is more difficult to explain the language of MANISTY, J. as he seems to have thought that if an attornment in a mortgage deed were within section 6 an ordinary lease would also be within it, which is clearly not the case so that it seems probable he was referring to sections 3 and 4 to which this observation as to leases would apply rather than to section 6 to which it would not apply. The words of the section omitting what is immaterial for the present purpose are "Every attornment whereby a power of distress is given by way of security for any present advance and whereby any rent is reserved as a mode of providing for the payment of interest on such advance shall be deemed" &c. Why do not these words exactly describe such an attornment clause as that in the present deed? It is said by MANISTY, J. in the case cited that to be within section 6 the power to distrain must be expressly given and must be a special power not the usual power of distress incident to a demise and that it must be a power given over some particular goods. But such a power would it seems to me be an authority or license to take possession of personal chattels as a

security for a debt within section 4 of the Act. Consider the consequences which would follow from holding that such an attornment clause was not within section 6. A money-lender's security is often taken upon goods on premises occupied by the borrower. In such a case the money-lender need only resort to the device of a sub-demise and an attornment clause, and his power to seize so far as the rent reserved goes provided it is a fair rent will be free from all the restriction of the Bills of Sale Acts. It is also said that if this construction is adopted an attornment clause so far as it confers a power of distress will no longer be of any value. I think that is so but I also think that that is exactly what the legislature intended when section 6 was enacted as enabling the mortgagor to retain the outward semblance of wealth while secretly giving his mortgagee power to take possession of the mortgagor's goods and chattels to the exclusion of the other creditors. Moreover it does not appear that in *Hall v. Comfort* (L. R. 18 Q. B. D. 11) the attention of the Court was drawn to *Ex parte Jackson*, *In re Bowes* (L. R. 14 Ch. Div. 725, 733) in which BAGGALLAY, L.J. expressed a clear opinion that such an attornment clause as was used in the present case would come within section 6 of the Act of 1878. For these reasons I have come to the conclusion that the clause in question does fall within that section.

The next contention was that if the case came within section 6 it also came within the proviso at the end, that nothing in that section shall extend to any mortgage of any estate or interest in any land, tenement or hereditament which the mortgagee being in possession shall have demised to the mortgagor as his tenant at a fair and reasonable rent. In support of this contention the cases of *In re Stockton Iron Co.* (L. R. 10 Ch. D. 335) and *Ex parte Punnett*, *In re Kitchen* (L. R. 16 Ch. D. 226) were cited. In the first of these cases JAMES, L.J., held that when by the mortgage deed an actual lease is created with a reservation of rent the mortgagees are as much mortgagees in possession for all purposes of taking the account of what is due on the mortgage as if they had granted the lease to some new lessee and had given notice to that lessee to pay the rent to them. In the second case a mortgagee had created two mortgages and had attorned tenant to the first

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mortgagee in the first mortgage deed and also to the second mortgagee in the second mortgage deed. The Court held that the right of the second mortgagee to distrain under his attornment clause was not affected by the prior attornment to the prior mortgagee. Mr. French sought to make use of these cases in this way. He contended that the first established that a mortgagee with an attornment clause was a mortgagee in possession within the meaning of the proviso and that the second mortgagee would be within the section and outside the proviso, thus seeking to meet a difficulty which had been pressed upon him that his construction of the proviso would leave nothing for the body of the section to operate upon. But as it seems to me a second mortgagee with an attornment clause must occupy as regards a third incumbrancer the position which the first occupies with regard to the second and that if the first must for all the purposes of taking the account of what is due on his mortgage be treated as between himself and the second mortgagee as being a mortgagee in possession so must the second mortgagee be treated as regards a third and so also must the third if he has an attornment clause as against the fourth if there is one. In that case every mortgagee with an attornment clause would come within the proviso and nothing would be left for the section to operate on. The words in the proviso are "which the mortgagee being in possession shall have demised" and I think these words only apply to a case when the mortgagee has taken actual possession under his mortgage deed and has subsequently demised to the mortgagor and not to a case where there has been no actual taking of possession and the demise has been created by the mortgage deed itself. This construction seems to me not only more consonant with the language of the proviso but also more calculated to secure the objects of the section. If Mr. French's construction is correct the creditors might see all the chattels on the mortgagor's premises swept away by the mortgagee although nothing had taken place which could lead them to suspect that he had given any one the power of seizing them to the exclusion of the other creditors, while in the other case the chattels could only be swept away when the mortgagee had actually taken possession, a fact which it is difficult if not impossible to keep secret. For these reasons I am

of opinion that the trustee is entitled to the order he asks for with costs.

From this decision Lady Willoughby de Eresby now appealed.

French, Q. C. (Lane with him): for Lady Willoughby de Eresby.

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This instrument comes within the proviso of section 6 of the Bills of Sale Act 1878. There was a demise at a fair and reasonable rent. The tenancy was quarterly. That was distinct from the payment of the interest on the advance which was half-yearly. (Counsel referred to *Ex parte Williams, In re Thompson*, L. R. Ch. Div. 138; 47 L. J. Bank. 26; 37 L. T. 764; 26 W. R. 274: *In re Stockton Iron Co.*, L. R. 10 Ch. Div. 335; 48 L. J. Ch. 417; 40 L. T. 19; 27 W. R. 433: *Ex parte Jackson, In re Bowes*, L. R. 14 Ch. Div. 725; 43 L. T. 272; 29 W. R. 253: *Hall v. Comfort*, L. R. 18 Q. B. D. 11; 56 L. J. Q. B. 185; 55 L. T. 550; 35 W. R. 48: *Batcheldor v. Yates, In re Yates*, L. R. 38 Ch. Div. 112; 36 W. R. 563.)

E. Cooper Willis, Q. C. (Houghton with him): for the trustee in bankruptcy.

All the cases cited had reference to documents executed prior to the Bills of Sale Act 1878. Section 6 aims at all mortgages where the mortgagee is not in possession. The words of the proviso are "which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent." Here the mortgagee was never in possession. Under the proviso possession by the mortgagee is the condition precedent of the instruments exempted. The section intended to do away with attornments unless they are registered.

June 23rd.

LINDLEY, L.J.:

The question for us to decide in this case is whether the mortgagee or the trustee in bankruptcy of the mortgagor is entitled to the sum of 1,715*l.* which represents the produce of a sale of certain

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chattels on which the mortgagee distrained by virtue of an attornment clause in a mortgage deed. The mortgage was dated January 28th, 1884. It was of leasehold premises which were the well-known "Willis's Rooms." The mortgage was for an advance of 20,000*l.* at five per cent. It contained provisions for the payment of the interest, for a power of sale by the mortgagee on default and a power to enter. It also contained an attornment clause under which the mortgagor attorned and became in effect tenant to the mortgagee at a yearly rent of 2,000*l.* by equal quarterly payments, and all money received for rent due under the attornment was to be accepted in the first place in satisfaction of the interest then in arrear. Further there was a proviso that the attornment should not make it compulsory on the mortgagee to collect the rent payable thereunder and that she should not be accountable to a second mortgagee or any subsequent incumbrancer for any rent that might have been recovered under such attornment. Now that is not perhaps a very common clause and it was obviously put in to remove any doubt as to whether the attornment clause rendered the mortgagee accountable as a mortgagee in possession, that is to say not only for the rents which she might actually receive but for rents which she might have received. It protects her from the equitable doctrine according to which a mortgagee in possession can be called upon to account. That proviso does not I think really affect the question we have to consider. There is no question that the attornment clause created the relation of landlord and tenant between the mortgagee and mortgagor. The question is, What is the effect of it? That depends on mortgage law and on the Bills of Sale Acts. The portion of the Bills of Sale Acts which is material is particularly section 6 of the Bills of Sale Act 1878, which is expressly addressed to attornment clauses and to instruments whereby a power of distress is given by way of security for money lent. The section does not apply to ordinary leases, and in my opinion there is no section in the Bills of Sale Acts which does apply to the landlord's right of distress under an ordinary lease. I make that remark in consequence of what has been said with regard to the case of *Hall v. Comfort* (L. R. 18 Q. B. D. 11), in which it was suggested that if this section applies to mortgages it must also apply to all leases. Section 6 provides that "Every

attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress." Let us stop there for a moment. In *Hall v. Comfort* (L. R. 18 Q. B. D. 11) it was said that that did not apply to attornments in mortgages. But the true meaning of the section is that every attornment by way of security for money lent is struck at and also some things not attornments, viz :—instruments by which a power of distress is given by way of security for any advance, and it is obvious that the drawer of the section was aware of the two forms of mortgage in vogue, one with the attornment clause, and one without the attornment clause and containing express permission to distrain. The former, unless there is some special reason against using it, is now by far the most common, and this section hits both. If the section stood there therefore, this attornment clause was within the section and a bill of sale.

But now comes the proviso to the section, which says: "Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent." That proviso is excessively puzzling, and it is very difficult to give effect to all the words. It does not say that "nothing in the Act shall apply to an attornment at a fair rent," but it says that nothing in the section "shall extend to any mortgage." How can it affect a mortgage unless the mortgage contains an attornment clause or some other clause which would be struck at by the previous part of the section? Then it is not to "extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent." Now does that protect an attornment clause at a fair rent which is not preceded

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by possession by the mortgagee. What appears to be contemplated is a case in which the mortgagee shall be in possession, and being in possession shall have made the demise. I cannot think that the proviso was intended to protect a deed which is at one and the same time a mortgage, a lease, and also constitutes the mortgagee a mortgagee in possession. When we look at the words "mortgagee being in possession," those words were inserted for a purpose. The true conclusion would seem to be that the thing contemplated was where the possession of the mortgagee precedes the demise, and that such demises only are intended to be protected by the proviso. Let us see for a moment what the general object of the Bills of Sale Act was. What was the legislature aiming at? At rendering it compulsory on lenders of money on the security of goods and chattels, to register their security. That was the leading idea. Then it was seen that if that was carried out rigidly it would fetter commerce, and some exceptions were made covering bills of lading and such like things, and language is used which goes to show that it was not intended to apply as between landlord and tenant, so as to deprive a landlord of the common law right to distrain. The object contemplated was solely the lending of money on goods and chattels, and the idea which runs through the whole is this: If you lend money on the security of chattels you must do it by a registered bill of sale: and they extend that to an attornment in a mortgage, but they exempt demises by a mortgagee in possession. Upon the true construction of the Act it seems to me impossible to bring within the proviso any attornment even at a fair rent. To claim the exemption the facts must show a mortgagee in possession followed by a demise. In my opinion, therefore, the decision of Mr. Justice CAVE was correct, and the title of the trustee to the money must be upheld.

LOPES, L. J.:

I entirely agree with the judgment which my brother LINDLEY has just given, and with the reasoning of my brother CAVE in the Court below. The question which really arises is, whether the proviso takes the case out of the earlier part of the section. I think not. I think what it means is an actual possession of the mortgagee and a subsequent demise to the mortgagor.

THE MASTER OF THE ROLLS (LORD ESHER):

I have given no judgment, because I am not prepared to say that I disagree with the judgments given. I must admit, however, that I had very grave doubts, and even though I have listened with the greatest attention to the very able judgment of my brother LINDLEY, I can only confess that those doubts still remain.

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Appeal dismissed, with costs.

French, Q. C.: I hope your Lordships will give us leave to appeal to the House of Lords if it is thought fit.

LINDLEY, L. J.:

Most certainly. It is a very important point.

Leave to appeal granted.

Solicitors: *Travers, Smith & Braithwaite*, for Lady Willoughby de Eresby.

Blewitt & Tyler, for the trustee.



COURT OF
APPEAL.

BEFORE THE
MASTER OF
THE ROLLS,
LINDLEY, L.J.
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June 8th,
11th, and 23rd.

IN RE ARMSTRONG, EX PARTE ARMSTRONG.

Bankruptcy Act, 1883, Section 152.

Married Woman—Separate Trade—Bankruptcy—Marriage Settlement—Right to Life Estate—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), section 1, sub-section (5), and section 19.

By a marriage settlement certain freehold property was vested in a trustee in trust for a married woman for life for her separate use, but without any restraint on anticipation, with remainder to such persons as she might by deed or will appoint, with remainder in default of appointment.

The married woman carried on a trade separately from her husband, and was adjudicated bankrupt under section 1, sub-section (5) of the Married Women's Property Act, 1882.

Held (LORD ESHER, M. R., dissenting): That the life estate passed to the trustee in the bankruptcy; and that the claim of the trustee to such estate did not "interfere with or affect the settlement" within the meaning of section 19 of the Married Women's Property Act.

THIS was an appeal on behalf of the bankrupt *Emma Armstrong*, from an order of the Divisional Court in Bankruptcy reversing an order of the Judge of the Brentford County Court whereby he directed the trustee in the bankruptcy to pay over to the said bankrupt certain moneys being rents received by such trustee in respect of certain freehold property, and further directed an account.

The case raised an important question under section 1, sub-section (5) and section 19 of the Married Women's Property Act 1882.

Section 1, sub-section (5) provides that "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

And by section 19 it is provided that "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere

with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

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The bankrupt *Emma Armstrong* is a married woman, who at the time of her bankruptcy carried on business separately from her husband as a lighterman and barge owner.

On May 6th, 1884, she was adjudicated a bankrupt on her own petition.

In December, 1881, the bankrupt had married for the second time, being then a widow with one child, a son by her first marriage.

By a settlement made in November, 1881, in contemplation of the marriage, she conveyed certain freehold houses belonging to her to a trustee in fee upon trust (after the solemnization of the marriage) to pay the rents to her or permit the same to be received by her during her life for her separate use, but without any restraint on anticipation, and after her death upon trust for such person or persons and in such manner as she, whether covert or sole, should by deed or will appoint, and in default of appointment, upon trust for the son of the former marriage and the children of the then intended marriage, in equal shares as tenants in common in fee, with remainder to her right heirs.

After the bankruptcy of the said *Emma Armstrong* the trustee in the bankruptcy received the rents from the tenants of the houses included in the settlement, but an order was subsequently obtained from the County Court Judge directing an account to be taken of all rents so received since the bankruptcy, and the amount found

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due to be repaid to the bankrupt to whom the receipt of the future rents was secured.

This order of the County Court, however, was reversed by the Divisional Court in Bankruptcy on May 14th last, the Court feeling itself bound by the judgments given in the case of *In re Armstrong* (L. R. 17 Q. B. D. 167) the actual decision in which had been reversed by the Court of Appeal on an entirely different ground (see *ante*, Vol. IV., p. 193 : L. R. 17 Q. B. D. 521).

Mrs. *Armstrong* now appealed.

Ribton : for Mrs. *Armstrong*.

Under section 1, sub-section (5) of the Married Woman's Property Act 1882 the bankruptcy of a married woman is a qualified bankruptcy. It extends only to her separate property. Section 19 has the effect of excluding separate property comprised in a marriage settlement. It provides that nothing in the Act "shall interfere with or affect any settlement." Neither the provisions of a marriage settlement nor the rights of the parties under it are to be affected. This life interest was outside the jurisdiction of the bankruptcy laws and did not vest in the trustee. Every kind of separate property would come within section 1, sub-section (5) but by section 19 separate property under a marriage settlement is taken out of its operation. (Counsel referred to *In re Whitaker*, L. R. 84 Ch. Div. 227; 56 L. J. Ch. 251; 56 L. T. 84; 85 W. R. 217; *Smith v. Whitlock*, 84 W. R. 414; *In re Stonor's Trusts*, L. R. 24 Ch. Div. 195; 82 W. R. 418; *Beckett v. Tasker*, L. R. 19 Q. B. D. 7; 56 L. T. 686; 86 W. R. 158; *Hancock v. Hancock*, L. R. 98 Ch. Div. 78; 86 W. R. 417.)

Yate-Lee : for the trustee in bankruptcy.

The trustee wishes to take the property under the settlement. He does not in any way seek to "interfere with or affect" the settlement. He is affirming the settlement and claiming under it. Section 19 means that where any property would have been bound by a settlement but for the provisions of this Act, then nothing in the Act is to prevent the property being so bound. The restriction contained in section 19 must be applied to all the sections of the Act and not alone to the bankruptcy section. (Counsel referred to

In re Queade's Trusts, 33 W. R. 816 : *Scott v. Morley*, see *ante*, Vol. IV., p. 286 ; L. R. 20 Q. B. D. 120 ; 57 L. J. Q. B. 43 ; 36 W. R. 67.)

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THE MASTER OF THE ROLLS (LORD ESHER) :

In this case there is a married woman with a marriage settlement Judgment. and after she was married she carried on a trade separately from her husband and in respect of that trade she was adjudicated such a bankrupt as a married woman can be under the Act of 1882. Now in that bankruptcy the trustee claims to administer amongst the creditors that property settled on her by her marriage settlement and the question is whether that property is liable to be handed to the trustee for division amongst the creditors. That depends on the true construction of the Married Women's Property Act 1882. Now I must not doubt that the people who passed that Act understood it at the time when it was passed. I do, however, very much doubt whether they or anyone else can understand it now at any rate without great difficulty. It is truly a most extraordinary Act of Parliament, and the reason of that in my opinion is that those who passed it tried to effect an impossibility. They tried to protect and preserve to her the property of a married woman, and yet in some cases to make her responsible for her debts. This case will eventually depend on the construction of section 19. But I cannot tell what that construction is unless I try to understand the object of the Act. Now I doubt very much whether the Act was intended to protect persons of means and position. There were already well-known means of doing that. The main object of the Act seems to me to have been to protect persons of limited means. Women who could and would exercise their own talents and industry in their own behalf and yet afterwards everything might be taken by a husband who might be a man altogether unworthy of thus seizing upon the proceeds of the wife's industry and who would take it for his own purposes. That was in my opinion the general idea of the Act. Such a woman might enter into a trade. It would not be supposed that a lady of position would go into a trade. The legislature was thinking

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of persons whose means are limited and who would be likely to exercise their own talents and industry. For people of means ordinary marriage settlements would be drawn by astute conveyancers, containing clauses against anticipation or other clauses introduced for the preservation of the property. But people of limited means do not go to astute conveyancers. So I should expect that in an Act intended to protect the property of married women care would be exercised not to take away the protection intended to be given merely because a settlement does not contain such clauses. But if a married woman goes into trade and makes money by business and then fails, it is fair and right that she should be responsible and I can understand the legislature saying that in such case we will protect the creditors and let everything but the settled property go to them. But why they should take away that which was settled on her in consideration of her marriage I fail to see. The Act is full of peculiarities. Before the Act a married woman could not make a contract. Now by section 1, sub-section (2) a married woman can enter into and render herself liable "in respect of and to the extent of her separate property on any contract." How can a contract in carrying on trade be "in respect of her separate property"? I do not understand it. But to go on with the section. She can be sued "in tort." What has that to do with a contract? It is a most curious Act of Parliament. Then come to sub-section (5) "Every married woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws in the same way as if she were a feme sole." The wife cannot be bankrupt unless she carries on a separate trade and then only in respect of her separate property. It is a limited bankruptcy. It is not all her property. Is it likely or not that something out of that should be saved which might prevent her being thrown on the parish with her children. Certainly it is likely and what can be more natural than that in this limited bankruptcy the something which should be saved to the woman should be her settled property. I should expect to see that excluded from the rule. There is plenty to go to the creditors without that. Everything realised in the trade will go. Is anything to be saved from the wreck? Section 19 says that

nothing shall "interfere with or affect any settlement." Now if a point is so fine that I can only see it by the greatest effort of imagination that point is too fine for me. To say that a settlement is not interfered with or affected when all the effect of it is upset and destroyed and every advantage which could be obtained under it is taken away is so fine a point that I cannot appreciate it. To interfere with a thing includes taking away its ordinary and natural and obvious result and effect. If property is in settlement and yet can be made subject to the bankruptcy of the person on whom it is settled which would not have been the case before the Act, the settlement is interfered with. In my opinion it is clear that section 19 refers to marriage settlements. I should expect to find a marriage settlement protected. I think it right that it should be protected, and when I find those words I think they mean to apply to a marriage settlement and to take a marriage settlement out of this Act. In my opinion therefore the trustee has no title to the settled property and the judgment of the Divisional Court ought to be reversed.

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LINDLEY, L. J. :

The question in this case turns on the construction of section 19 of the Married Women's Property Act 1882 taken in connection with section 1, sub-section (5), of the same Act. Mrs. Armstrong carried on a trade separately from her husband and thereby became in respect of her separate property subject to the Bankruptcy laws as if she were a feme sole (see section 1, sub-section (5)). She committed an act of bankruptcy and was thereupon adjudicated bankrupt. But as decided by this Court (L. R. 17 Q. B. D. 521) her bankruptcy only affected her separate property and did not affect property over which she had only a power of appointment and which in default of appointment would belong to other people. On her marriage in 1881 some property was settled on her for life for her separate use with remainders over. There was no clause in the settlement restraining her from anticipation.

The question now arises whether this life estate has passed to her trustee in bankruptcy or whether she is entitled to enjoy it notwithstanding her bankruptcy.

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The trustee claims it under the Bankruptcy Act and he is entitled to it under that Act unless his title is excluded by section 19 of the Married Women's Property Act 1882. It is contended for Mrs. Armstrong that if it had not been for section 1, sub-section (5) of the Married Women's Property Act the trustee could not have claimed her life interest and that his claim thereto being based on that section, is one to which effect cannot be given without interfering with or affecting her settlement contrary to section 19. It was further contended on her behalf that the effect of section 19 is to render it necessary to distinguish separate property to which a married woman is or becomes entitled under some settlement or agreement for a settlement and separate property to which she is or becomes entitled in some other way; and that whilst section 1, sub-section (5), applies to a married woman's unsettled separate property it does not apply to separate property which she takes under a settlement.

If the Act is examined it will be seen that it not only makes that to be separate property which was not so before in the absence of some agreement or trust to that effect but the Act also annexes to separate property consequences which were not before incident to it or not incident to it to the same extent as under the Act (*e.g.* section 1, sub-sections (3) and (4)). In extending the rights of married women care has also been taken to protect their creditors and in some cases to extend their rights against the separate property of married women with whom they have dealt. Now it will be observed that section 19 does not say that nothing in the Act shall interfere with or affect the incidents annexed by the Act to separate estate or the consequences which follow its creation. The section 19 refers in the early part of it to settlements and the words "interfere with or affect any settlement" mean invalidate or render inoperative any settlement. Settlements creating separate estate are to have the same effect as if the Act had not passed and so read the section is an important proviso on section 2 and on section 5: In this case the trustee is claiming under the settlement not against it: he is not interfering with or affecting it. He claims the life estate created by it because the married woman entitled to that life estate has done an act which amounts in point of law to an alienation of it. It is true that but for the Act she

could not have been made bankrupt or could not have aliened her life estate in the particular mode in which she has done so. But no alienation of her life estate be it voluntary or be it involuntary is an interference with the settlement nor does such alienation affect it.

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The second clause of section 19 shows that interfering with a settlement means something different from affecting an estate created by it. The second clause would not be wanted if the construction contended for, were correct. Mr. Ribton's argument is in truth open to the objection that it proves too much. Considering that by far the largest portion of separate property is created by settlement and that his argument if acceded to would take all separate property so created out of the operation of the Act the consequences would be that the Act would have left the old law to apply to settled separate property and the new to unsettled separate property. Such a construction of the Act would not only lead to the utmost confusion but would be destructive of one of the main objects of the Act which was to extend to all married women having separate estate and to their creditors the rights enumerated in the various sections. I can find no warrant for drawing any distinction between separate property acquired by settlement and separate property otherwise acquired as regards the consequences attaching to it when acquired. To draw such a distinction would not be to give effect to the statute but practically to destroy its operation to a very great and in my opinion a very alarming extent. I may add that in my judgment section 19 applies to all settlements, whether made before or after marriage, and is not confined to what are popularly called marriage settlements, such as that made in this case. The appeal ought to be dismissed.

LOPES, L. J. :

I agree with the judgment of LINDLEY, L. J., and cannot agree with the judgment of the Master of the Rolls.

Mrs. Armstrong (the bankrupt) under the settlement was entitled to the rents and profits of the houses during her life for her separate use, but expressly without any restraint on anticipation. A power is given to her to appoint the property by deed or will to such persons, for such estates as she shall think fit. Subject to

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that, the trustee is to hold the property for the benefit of the child by a previous marriage and the children of the intended marriage. There are other powers. The Court has now to deal only with the life interest of the bankrupt.

The question is whether the life interest of the bankrupt in these houses is available for the benefit of her creditors as being her separate property within sub-section (5) of section 1 of the Married Women's Property Act, 1882. No restraint on anticipation being imposed, the bankrupt has an absolute power of disposition in respect of the life estate. That the life estate is in the circumstances of this case separate property, and subject to the bankruptcy laws, is beyond question, unless it can be brought within section 19 of the same Act. There being no restriction against anticipation, the words of section 19 applicable are, "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made whether before or after marriage respecting the property of any married woman." It is contended that this limits the meaning of the words "separate property" in sub-section (5) of section 1, and makes those words applicable only to unsettled as distinguished from settled separate property, in fact excluding from the operation of sub-section (5) of section 1 all separate property which is settled, although the married woman has absolute power of disposing of it *inter vivos* or by will in the same way as a *feme sole*. It would require strong and unequivocal language to justify such a construction. The legislature, in my opinion, contemplated nothing so unreasonable. All that is intended is that the provisions of settlements are not by this Act to be invalidated. It is an interference with the provisions of the settlements, not an interference with settled property under settlements over which the married woman has absolute control, that is contemplated. If the trustee here was claiming in derogation of the provisions of the settlements I could understand Mr. Ribton's contention, but he is really claiming under it, and in affirmance of its provisions. Claiming in the same way as any other alienee to whom the life interest was conveyed, the only difference being that the alienation here is the act of the law and not the voluntary act of the party. I am of opinion, therefore, that the life interest of the bankrupt in these houses is her separate property within sub-

section (5) of section 1, and that section 19 does not prevent that sub-section from applying.

Appeal dismissed.

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Solicitors : *Woodbridge & Sons*, for Mrs. Armstrong.
Farnfield & Co., for the trustee.

PRACTICE.

IN RE THOMAS, EX PARTE COMMISSIONERS OF WOODS AND FORESTS. DIVISIONAL COURT.

Bankruptcy Act, 1883, Section 55 and Section 150.

Disclaimer—Property Held of the Crown—Right of Trustee to Disclaim.

BEFORE
 CAVE, J.,
 AND
 WILLS, J.
 1888.
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 June 18th.

Held: That the provisions of section 55 of the Bankruptcy Act, 1883, which give to a trustee in bankruptcy the right to disclaim onerous property, are binding upon the Crown; and a trustee is entitled under that section to disclaim a bankrupt's interest in property held by him from the Crown.

THIS was an appeal from an order of the Judge of the Cheltenham County Court giving to the trustee in the bankruptcy of *J. T. Thomas* leave to disclaim under section 55 of the Bankruptcy Act, 1883, certain property held of the Crown.

The case raised the important question whether the Crown is bound or affected by a disclaimer made pursuant to section 55 by a trustee or official receiver.

The facts of the case were not substantially in dispute.

The bankrupt *J. T. Thomas* was entitled to a share and interest

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IN RE
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FORESTS.

in a certain tract of coal in the Coleford High Delf Vein in the Forest of Dean, known as the "Success Level Gale."

On September 25th, 1886, the official receiver as trustee in the bankruptcy gave notice of disclaimer of all the estate and interest of the bankrupt in this gale.

Application was thereupon made to the County Court to set aside the disclaimer on the ground that the disclaimer clause—section 55—of the Bankruptcy Act, 1883, did not bind the Crown.

The County Court Judge, however, held that the trustee was entitled to disclaim, and from that order the Crown now appealed.

Gore: for the Commissioners of Woods and Forests.

The case simply raises the question as to how far section 55 of the Bankruptcy Act 1883, is binding on the Crown. By the Dean Forest Amendment Act 1841, section 1, the grant of a gale shall be deemed to have conferred on the grantee, his heirs and assigns, an interest in the nature of real estate. And by section 4 it is provided that the obligation to pay the rent, royalties and dues, shall be in the person in actual possession or in receipt of the rents and profits of the gale, and be a personal obligation, and that he may be proceeded against as if he had entered into a covenant with the Crown to pay such rents, royalties and dues. I think I must admit that the bankrupt's interest may be described as real estate burdened with onerous covenants, and that it comes within the description of "property of the bankrupt" dealt with by section 55. But it is a general rule in the construction of Acts of Parliament that the Crown is not reached except by express enactment or by necessary implication in any case where it would be ousted of an existing right or prerogative. Therefore the Crown is only bound by the Bankruptcy Act 1883 to the extent specified in section 150, which enacts that "Save as herein provided the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown." The bankrupt's interest in the gale in question is vested in the official receiver under section 54, and as the covenants run with the land he thereupon became liable to perform them. But the Crown is not bound by section 55 giving the trustee a right to

disclaim, as section 150 clearly does not include the disclaimer provisions. Section 150 deals with four things: It refers first to the provisions relating to "the remedies against the property of a debtor." Those would be sections 9, 42 and 45: Then it refers to "the priorities of debts," which relates to section 40 of the Act.

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[CAVE, J.: Why is this not a remedy against the property of a debtor?]

It would certainly be straining the meaning of the words "the provisions of this Act relating to the remedies against the property of a debtor" to say they refer to section 55. It surely cannot properly be said that a clause which gives an option to the trustee to determine a lease is a section "relating to the remedies against the property of a debtor." (Counsel referred to *Ex parte Postmaster General, In re Bonham*, L. R. 10 Ch. Div. 595; 48 L. J. Bank. 84; 40 L. T. 16; 27 W. R. 325; *In re Henley & Co.*, L. R. 9 Ch. Div. 479; 39 L. T. 53; 26 W. R. 885.)

Muir Mackenzie: for the official receiver.

The case is clear upon two grounds: Either the provisions of section 55 are provisions "relating to the remedies against the property of a debtor" within section 150; or inasmuch as the Act is not taking away but giving the Crown as lessor a right against another person, viz. the trustee, if the property vests in the trustee, the Crown cannot say that it assumes the liability of the trustee under sections 20 and 54 of the Act without the corresponding power of the trustee to get rid of it.

CAVE, J.:

I am of opinion that the judgment of the County Court Judge dismissing the motion made to him was correct. The motion was to set aside a disclaimer given by the official receiver who was the trustee in the bankruptcy, by which disclaimer he disclaimed the interest of the bankrupt in a certain gale within the Forest of Dean. Now it appears to me that the best way to put the case is to say that it comes within the language of section 150 of the Bankruptcy

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Act 1883. Section 150 provides that "Save as herein provided the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown." Now the remedies against the property of a debtor are not put under any separate heading in the Act, but where provisions are found relating to the remedies against the property of a debtor they will bind the Crown. The ordinary remedies in this case are remedies by way of covenants, by which the Crown might impose on the debtor certain onerous liabilities. On the making of a receiving order no action could be brought on the covenants, and the effect of discharge is that the bankrupt is absolutely relieved. Then by section 54 the property is transferred to the trustee. Now it seems to me that that is all one mode of dealing with the remedies against the property of a debtor. The remedies against the debtor are taken away, and in the interest of the creditors there is a vesting of the property in the trustee, and as attaching to that there is a right to disclaim and get rid of the property altogether. You must look at the whole of the sections, and the effect is that the creditor can no longer get at the property of the debtor. On the other hand there is substituted the right to prove against the estate, and the property is vested in the trustee in order that he might dispose of it to the best advantage. It would be outrageous to say that the Crown had a right to interfere with the vesting of a Crown lease. The sections which provide for the vesting of a property in the trustee are so connected with the sections which restrain actions against the debtor that we must read them together, and say that they do relate to the remedies against the property of a debtor. If section 54 is a section relating to the remedies against the property of a debtor, so is section 55. It is one whole, showing on what terms the property is to vest in the trustee.

WILLS, J. :

I am of the same opinion, and I have very little to add. The extremely narrow construction put forward by the appellants would lead to consequences so extravagant that that in itself must be a strong argument that it is not a proper construction of the Act. The proper view, in my opinion, is to take the group of sections

which deal with taking the property out of the bankrupt and vesting it in the trustee as a whole, and say that they are provisions relating to remedies against the property of a debtor.

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Appeal dismissed.

Solicitors: *The Solicitor to the Commissioners of Woods and Forests*, for the Commissioners.

The Solicitor to the Board of Trade, for the official receiver.

IN RE ROBERTS, EX PARTE DANIEL.

Bankruptcy Act, 1883, section 48.

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MR. JUSTICE
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Fraudulent preference—Alleged purchase of debt by third party—Claim of trustee. June 27th.

Where a creditor having knowledge of an act of bankruptcy refused to accept money from his debtor, but subsequently executed an assignment of the debt to a friend of the debtor who was stated to be willing to purchase the debt at its full value, and it appeared that such alleged purchaser was altogether ignorant of the matter, the money paid to the creditor being in reality borrowed by the debtor himself for that purpose a few days prior to a receiving order being made against him.

Held: That the trustee in the bankruptcy was entitled to the money so paid: and that the creditor must repay it to him forthwith.

THIS was a motion on behalf of the trustee in the bankruptcy for an order that the National Bank should repay to the trustee the sum of 175*l.* paid to it on September 3rd, 1886, on the ground

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that the said sum had been received by the Bank after notice of an available act of bankruptcy.

On July 26th 1886 a bankruptcy petition was presented by the National Bank against the debtor *Roberts*, but it was then discovered by Mr. *Tatham*, the solicitor to the Bank that there were already eleven prior petitions against the debtor, one of which had been presented by Sir F. Perkins.

Negotiations were subsequently entered into by the debtor with the National Bank for the purpose of paying off their debt which amounted to 150*l.*, with 25*l.* costs, but the Bank being aware of the debtor's circumstances declined to receive any money from him.

It was stated, however, that on September 3rd, 1886, a solicitor named *Kemp* called on Mr. *Tatham*, the solicitor to the Bank, and intimated to him that a person named *Maughan*, who was said to be a friend of the debtor's, was desirous of buying their debt.

The National Bank thereupon executed an assignment to the name of *Maughan*, and received notes to the amount of 175*l.*

On September 6th 1886 a receiving order was made against the debtor *Roberts* on Sir F. Perkins' petition.

Upon investigation by the trustee it appeared that *Maughan*, the alleged purchaser of the debt, had no knowledge whatever of the matter, and it was also discovered that the debtor *Roberts* had obtained from a Mr. *Nathan* a loan for the avowed object of paying off a bankruptcy petition, and that the notes given to the National Bank were those received by the debtor at the bank where Mr. *Nathan's* cheque was cashed.

The trustee now applied for an order to the National Bank to repay the 175*l.*

Herbert Reed : for the trustee.

The question appears to be simply whether the money paid to the National Bank was in fact the bankrupt's money. It is admitted that the Bank knew quite well of the other petitions. I have an affidavit of Mr. *Nathan* which states clearly that the debtor *Roberts* applied to him for an advance to pay off a bankruptcy petition and that he gave him a cheque which was cashed by the bankrupt the notes then received by him being traced to be

those given to the National Bank. Mr. *Maughan* is also in Court and will state that the debt was never purchased by him, and that he knew nothing of the matter.

[Mr. *Maughan*, the alleged purchaser of the debt was called and denied that any part of the money paid to the National Bank belonged to him.]

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Houghton: for the National Bank.

The action of the National Bank was *bonâ fide* throughout. They knew of the act of bankruptcy and refused to accept any money from *Roberts*. The solicitor *Kemp* said that he represented Mr. *Maughan* and that *Maughan* would buy the debt. The Bank assigned the debt to him, and believed that it had been *bonâ fide* bought by him. Moreover if the money was advanced by *Nathan* for the specific purpose of settling the petition, the mere fact that the notes were in *Roberts'* hands for an hour or two would not invalidate the transaction. It would have been a gross breach of faith on *Roberts'* part not to have settled the petition. The money was parted with by *Nathan* on the express understanding that it would go for that purpose. *Roberts* was a mere conduit pipe. The money was impressed with a trust in his hands. The cheque was given for a specific purpose and applied for a specific purpose.

CAVE, J:

It is impossible to uphold the contention of the respondents in Judgment. this case. It is beyond question that the money was the money of *Roberts* and the National Bank must repay it. In this sceptical generation I must confess that I cannot but feel astonished at the innocence which appears to have been displayed by Mr. *Tatham* in believing that *Maughan* was willing to buy at a full value the debt of a man who had several petitions presented against him and also to give 25*l.* towards the costs of the petition. The order asked for must be made.

Application allowed with costs.

Solicitors: *G. J. Simpson*, for the trustee.

Tatham, Son, & Lousada, for the National Bank.

BEFORE
MR. JUSTICE
CAVE.
1888.

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27th.

IN RE PENNINGTON, EX PARTE COOPER.

Antenuptial Settlement—Void as against Creditors—Fraud—13 Eliz. c. 5.

Although a woman may know that a man is in embarrassed circumstances and that her marrying him at the time may be of service to him and preserve his property, if nevertheless her object in marrying him is not solely for the purpose of preserving his property but for the ordinary reasons which lead men and women to take that position with regard to each other, an antenuptial settlement executed by the husband will not be void.

But where the marriage is not an honest marriage and is entered into solely for the purpose of attempting to make a settlement valid which otherwise would be void, and where but for a desire to defraud the creditors no marriage between the parties would have taken place, the antenuptial settlement will be set aside.

Thus where a man executed an antenuptial settlement and married a woman with whom he had had an immoral intimacy and the evidence shewed that such marriage was entered into solely with intent to defraud his creditors, the wife being implicated in the transaction.

Held: That the settlement was fraudulent and void as against the creditors.

THIS was an application on behalf of the trustee in the bankruptcy of *C. P. Pennington* for an order that an antenuptial settlement dated October 23rd, 1886, and executed by the bankrupt might be set aside on the ground that it was a fraud upon the creditors within the meaning of the Statute of Elizabeth.

The bankrupt *C. P. Pennington* formerly acted as trustee of certain property in which character he allowed a considerable portion of the trust moneys to get into the hands of Messrs. *Parker & Parker*, the well-known solicitors of Bedford Row, who absconded in 1884. Proceedings in Chancery were consequently instituted against Mr. *Pennington* and by orders dated December 1885 and May 1886 he was directed to replace various sums amounting altogether to about 7,000*l.*, with costs.

At this time the only assets which he possessed were the equities of redemption of certain property on mortgage, and on October 23rd, 1886, he executed a settlement covering all the

property which he then possessed and married the present Mrs. *Pennington*, who was then a widow named Mrs. *Wingfield*.

In March 1887 he was adjudicated bankrupt.

With a view to set aside this settlement made by the bankrupt on October 23rd, 1886, a private examination was held before the Registrar at which Mrs. *Pennington* and other witnesses were examined and it was then elicited that Mrs. *Pennington* had been married twice or three times before her marriage with Mr. *Pennington* in 1886: that she first became acquainted with him in the year 1880 when he came with a family named *Fendall* to live in a house which she occupied in Sloane Street: that she had been herself in business as a dyer and in September 1883 she became a bankrupt: that she had three children, one by a previous husband, and two by a person named *Bell* with whom she had cohabited: that her present husband *Pennington* knew of her relations with *Bell*, and that an intimacy had taken place between her husband and herself before their marriage but it ceased about two years previously: that her engagement to marry him was made in 1883, and it was her own choice that she was not married long before October 1886 and as a matter of fact she did not particularly care for the marriage: that she was well acquainted with her husband's affairs before she married him and she was told that if she then married and had a settlement the effect of the settlement would be to secure his property: that she knew there was a judgment against him and on September 13th, 1886, his solicitor wrote a letter which she saw stating that it was competent to him to execute the settlement: that she married him in the following month so that he might have something left for his old age.

The trustee in the bankruptcy now applied to the Court that the settlement in question might be set aside.

Tindal Atkinson, Q.C. (Sidney Woolf with him): for the trustee.

Upon the evidence taken at the private examination and which I have read to the Court to-day the settlement is clearly void against the trustee. In *Bulmer v. Hunter* (L. R. 8 Eq. 46; 38 L. J. Ch. 543; 20 L. T. 942) it was held that "Where a man executed an antenuptial settlement and married a woman with

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whom he had previously cohabited, with intent to defraud his creditors the wife being implicated in the transaction, the settlement was fraudulent and void as against creditors." So in *Parnell v. Steadman* (1 Cab. & Ellis, 158) it was held that "To avoid an ante-nuptial marriage settlement as a fraud upon creditors it must be shown that both husband and wife were parties to the fraud." The evidence shows that very clearly in this case.

E. Cooper Willis, Q.C. (Turner with him): for the trustees of the settlement.

Before the Court can set aside the settlement it must be shown that the marriage took place and that the settlement was executed with intent to defraud the creditors, and that both husband and wife were parties to the fraud. The evidence certainly does not show this to be the case and indeed the dates negative any idea of fraud. The cases cited are distinguishable. In *Fraser v. Thompson* (1 Giff. 49) there was a "Bill by assignees of a bankrupt to set aside a settlement of the greater part of the bankrupt's estate made previous to and in consideration of marriage when the bankrupt was embarrassed and insolvent and the lady aware of his embarrassments. It was dismissed with costs; it appearing that the marriage had been honestly contracted after an engagement for several years." That case followed the principle laid down in *Campion v. Cotton* (17 Ves. 263). (Counsel also referred to *Columbine v. Penhall*, *Penhall v. Miller*, 1 Sm. & Giff. 228: *Ex parte Games*, *In re Bamford*, L. R. 12 Ch. Div. 314; 40 L. T. 789; 27 W. R. 744.) On the examination before the Registrar Mrs. *Pennington* was nervous and excited and her evidence is to be received with material qualifications. What she does say now is this: I have an affidavit in which she says:—That Mr. *Pennington* agreed to marry her in August 1888 and it was proposed that they should be married the following year; but owing to Messrs. *Parkers* absconding in 1884 the marriage was postponed. She ultimately agreed to fix a day on the understanding that the settlement should be made of his property, which he had promised to execute before they became engaged at all. It was not true that before the marriage she had lived with Mr. *Pennington* as his wife or mistress, and only on three or four occasions and no more in November and

December 1888 an improper intimacy had occurred between them. The settlement was perfectly *bonâ fide*.

[Mrs. Pennington was cross-examined and said:—That she married in October 1886 because Mr. Pennington pressed her and she thought his difficulties had practically come to an end. She would not have married without a settlement and an assurance that it would protect his property. Her object was to secure the residue of the property, after payment of the mortgages, for herself. She naturally supposed that her husband would share in the protection which the settlement secured to her.]

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CAVE, J :

This is an application to set aside an ante-nuptial settlement Judgment. upon the ground that it was a fraud upon the creditors within the meaning of the Statute of Elizabeth.

The facts are mainly to be gathered from the depositions and the examination in Court of Mrs. Pennington. It is certainly a somewhat remarkable circumstance that her husband refuses to come into Court and stand the test of cross-examination. The other two gentlemen whose depositions have been read do not say anything that is very material in this particular case, except that they do undoubtedly support the statement of Mrs. Pennington that in 1888 Mr. Pennington promised to marry her. The circumstances are certainly somewhat remarkable. In 1888 Mr. Pennington, who had been for some three years acquainted with Mrs. Wingfield as she was then called, and who was aware that she had for some years been engaged in immoral relations with Bell—that she had been living with Bell as his wife, and had two illegitimate children by him—promised to marry her. This is said by Mrs. Pennington (and the evidence by Mr. Debnam and Mr. Shearman tends to confirm it) to have taken place in August 1888. At that time Mrs. Wingfield was forty-one. Some time in September 1888 very shortly after the promise to marry, she became a bankrupt. No dividend appears to have been paid; and Debnam, the trustee under this marriage settlement was the trustee in her bankruptcy.

Now one would have imagined, looking at the ages of the parties, and the fact that she had become a bankrupt, that the promised and contemplated marriage would have taken place then. Nothing

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whatever of the kind took place, and shortly afterwards immoral relations were established between Mrs. Wingfield and Mr. Pennington. I have a very vague testimony as to when those relations began and when they discontinued, and the statements made by Mrs. Pennington during her private examination certainly are not reconcileable in spirit with the statements which she has made here to-day, that these immoral relations were of a casual nature and only occurred on three or four occasions. I should certainly draw from her statements, on the private examination, a very different inference. However that may be, no marriage as I understand followed then. On December 10th 1885 a judgment for a large amount was obtained against Mr. Pennington by one of the Fendalls and on May 18th 1886 there was a second judgment. On July 26th 1886 Mr. Pennington admitted that he could not pay the amount of these judgments, and expressed his willingness to file a petition in the Bankruptcy Court in Ireland, as he objected to doing so in England. Therefore, at this time he was fully aware that he was unable to pay his debts. On September 18th 1886, in answer to a post-card from him Mr. Shearman writes a letter with reference to the effect of a marriage settlement and this letter it is admitted was shown to Mrs. Wingfield. Upon October 23rd 1886 the settlement in question took place. It was in fact a settlement of all the property the bankrupt possessed being the equity of redemption upon certain mortgages, and on October 24th or 26th the marriage actually took place.

Now the question which I have to decide is, whether that was an honest marriage or whether it was a dishonest marriage having for its only real end and purpose the defrauding of the creditors, and the removing out of their reach the relics of Mr. Pennington's property.

As I have said, the fact that he promised to marry Mrs. Wingfield in the latter part of August 1883 is, I think put beyond question by the evidence of Mr. Debnam and Mr. Shearman by their depositions which have not been cross-examined to. Mr. Debnam's evidence I should not be so much inclined to place reliance upon if it stood alone because it is undoubtedly extremely indefinite as to the time when Mr. Pennington said a word of this engagement, but Mr. Shearman's evidence is more definite and, as

I have said, not being cross-examined to, I conclude that I may fairly place reliance upon that.

The next thing one asks one's self is: There being a promise to marry in August 1883, what was the reason why the delay took place from August 1883 down to October 1886? When privately examined, Mrs. Pennington could give no reason at all why this delay took place. In her answers to some of the questions put to her upon that subject, she says this:—"Now then this engagement had lasted from 1883."—"Yes."—"Why were you not married?"—"I cannot say."—"Why not?"—"I really cannot say I am sure."

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Now I quite agree with some of the remarks which have been made by Mr. Cooper Willis upon private examinations that one has to watch them undoubtedly with some amount of care, because leading questions may be put, and frequently are put in cross-examination and produce very frequently from a stupid, an unintelligent, a confused, or excited witness, answers which do not represent what is really passing in his or her own mind; and therefore it is important to see what the questions are, which are put and what the answers are that are given. In this particular instance I can see no fault to find. She is asked a very natural question, "Why were you not married earlier than three years?" A most unusual time for parties to remain engaged and unmarried under any circumstances, but still more unusual when parties have reached the mature age which existed in this case. Now I have had an opportunity of judging for myself of the behaviour of Mrs. Pennington under cross-examination and I certainly think that she is perfectly able both to understand the questions that are put to her and to give an intelligent answer, without being led by excitement or confusion to say something which she does not mean. Here she is asked for a reason. "Why were you not married?"—"I cannot say."—"Why not?"—"I really cannot say."—"Why not?"—"I cannot say I am sure."—"Why were you married then in October? Perhaps you cannot answer that." And that again was a perfectly pertinent question—You were not married for three years and more, after the promise to marry had taken place: you cannot tell me what is the reason for delay; can you tell me then why the delay came to an end? If you cannot give

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me a reason why it was delayed till October 1886, can you tell me why it took place then?—and she says “No; it was a matter of my own choice. I might have been married long before.”—“Why were you married in October?”—“As a matter of fact I did not particularly care for the marriage.” None of these answers are the suggestions of the Counsel who was cross-examining her. It is not that he puts something into her mouth and she being confused and excited takes up and adopts as her answer the suggestion that is made to her; but she is simply asked to give an explanation which any woman, one would say, would be perfectly ready to give at a moment’s notice, “Why was your engagement continued for three years and why when it had continued for so long did it come to an end?”—She cannot tell at all, except that she did not particularly care for the marriage.

As I have said when we come to this part of the case, the case depends really and entirely upon the evidence of Mrs. Pennington. Although Mr. Debnam and Mr. Shearman speak of being acquainted with the engagement, they do not give any reason why it was so long unfulfilled: they do not give any reason why it was fulfilled at last; and as I have said the reason why the marriage itself was actually contracted at last is left entirely to Mrs. Pennington, Mr. Pennington himself declining to come forward to face the ordeal of cross-examination. She says that Mr. Pennington was pressing her, and that she could have been married at any time. Now can I believe that? Immoral relations had been established between them in 1883. How long they continued is, to my mind far from being clearly ascertained. The statements which Mrs. Pennington makes are not generally very clear. The statements which she has made in the private examination when asked how long these relations continued were as vague and as unsatisfactory as possible. In 1884 they parted, as I have said, or, at all events, they no longer lived in the same house. With regard to their relations after that we know absolutely nothing except from the statement of Mrs. Pennington herself. Why on earth should Mr. Pennington press her to marry him? These immoral relations had existed between them; the ordinary reason for pressing on a marriage was absent in his case. Why should he have been anxious during this time to press her to marry him, and why, on the other hand, should she have

been unwilling to comply with that request of his? I can give no satisfactory answer to these questions.

Now I come to what she is asked with reference to her reasons for the marriage. She is asked at Question 914, "Just let me put it to you: Were you told that if you married and had a Settlement, the effect of the Marriage Settlement would be to secure Mr. Pennington's property?" And she says "Yes, quite so."—"When you say quite so, do you mean that it was so?"—"That was so—yes."—"You thought so?"—"What was left of it. I did not know there would be anything."—"Who told you that?"—"Mr. Shearman wrote to Mr. Pennington after Mr. Pennington wrote him a letter." That is only important of course as showing that she was fully aware of what the effect of the settlement would be. That alone, of course, would come to nothing, because every married woman who has arrived at the age of Mrs. Pennington would probably be aware more or less accurately of what the effect of a marriage settlement upon her would be; and the fact that she knew that therefore, standing by itself, would count for very little. It only shows this much, that she was aware what the result of the marriage would be. It does not show that that was the result which actually actuated her in going through the ceremony of marriage. At question 957 she is again asked on the subject. "Therefore your object was, was it not, to secure the property of Mr. Pennington?"—"No, my object was this: I did not think Mr. Pennington had any other property. I knew it then, but if there was anything over after settling"—"If there was anything left after the mortgagees?"—"Yes."—"You desired to secure that?"—"Certainly."—"So that it should not go to the Fendalls?"—"The Fendalls have no right to it. Mr. Pennington never had their money and Mr. Pennington did not spend their money: they simply threw it away themselves." That is not unimportant, because this is a matter which she volunteers herself. There is nothing at all in the question to lead to that explosion of feeling against the Fendalls, but there it stands. Then later on towards the end of the examination she is asked some other questions. "You are asked what your object was"—that is the object of marrying.—"I had no object."—"What?"—"I had no object whatever?"—"Then why did you marry him at that time?"—

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"Why did I marry him?"—"Yes at that time, after the letter of Mr. Shearman?"—"Because if there was anything at all left after paying these moneys away he would have something for his old age. He would have nothing after if I had not married him." Now I cannot see that that answer of hers is at all suggested by any question put to her in the examination. That appears to be, after some little pressing as to what her object was, that which presented itself to her mind as being the object which she had in view. "After the paying of the mortgages?"—"Just so. He would not have been able to pay the Fendalls their money."—She has been asked to-day as to what she meant by that, and she point blank contradicted it, and said that her object was not to save the money for Mr. Pennington, but that she was thinking of herself and not of Mr. Pennington. Of course a statement of that kind coming after she has learnt what the effect of her answer would naturally be, is not one which is calculated to impress one with any confidence or belief in it, nor does her previous history incline me to place much confidence in what she says. I have here to deal with these facts, that there was an agreement to marry in August 1883, which for some reason, of which no credible explanation was given, was not carried out until October 1886; that it was carried out in October 1886 at a time when Mr. Pennington knew himself and she knew him to be hopelessly insolvent; and that I can see no satisfactory reason why it should be carried out except for the purpose of preserving to him his property. Why he should want to marry her under all the circumstances of the case at that time except for that reason I cannot possibly conceive. Why she should want to marry him appears equally unintelligible. She says herself that she did not care about it, as she had no particular wish to do it, but that she did it at last only because three years before she had promised to do it.

I cannot help coming to the conclusion on these facts that this marriage was not an honest marriage. It was not that these parties had the slightest desire to marry each other and to become husband and wife for the ordinary reasons which actuate people who take upon themselves that position, but their only object was under cover of the relationship of husband and wife, to put this property out of the reach of Mr. Pennington's creditors.

Now when that is the object with which a marriage and an ante-nuptial settlement take place, there can be no doubt I think that that ante-nuptial settlement is void. There may be cases where the contemplation of the possible result of a marriage will not make the ante-nuptial settlement void. A woman no doubt may know that a man is embarrassed, and she may know that her marrying him at that time may be of service to him and preserve his property; but if, nevertheless, she meant to marry him not solely for the purpose of preserving his property but for the ordinary reasons which lead men and women to take that position with regard to each other, that undoubtedly will not invalidate the settlement. But where the marriage is for the purpose of attempting to make a settlement valid which otherwise would be void, where but for a desire to defraud the creditors they would not dream of marrying each other, why undoubtedly in such a case such a settlement would be void, and that that was so in this case I confess after the evidence I have heard I entertain no doubt.

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I must therefore order the settlement to be set aside.

Application allowed with costs.

Solicitors: *Stibbard, Gibson & Co.*, for the trustee in the bankruptcy.

S. G. Shearman, for the respondent.

Cases relied upon or referred to:—

Bulmer v. Hunter, L. R. 8. Eq. 46; 38 L. J. Ch. 543; 20 L. T. 942.

Parnell v. Steadman, 1 Cab. & Ellis, 153.

Fraser v. Thompson, 1 Giff. 49.

Campion v. Cotton, 17 Ves. 268.

Colombine v. Penhall, 1 Sm. & Giff. 228.

Ex parte Games, In re Bamford, L. R. 12 Ch. Div. 314; 40 L. T. 789; 27 W. R. 744.

PRACTICE.

BEFORE
MR. JUSTICE
CAYE.
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June 28th.

IN RE CRIPPS, ROSS & Co., EX PARTE ROSS.

Bankruptcy Act, 1883, section 46, sub-section (2), and section 148.

Bankruptcy Rules 1886. Rule 258.

Execution for sum exceeding twenty pounds—Seizure and Sale—Retention of proceeds by Sheriff for fourteen days—From what date fourteen days to run—Petition by corporation—Affidavit of authorised officer.

Section 46 sub-section (2) of the Bankruptcy Act, 1883, provides that where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale "and retain the balance for fourteen days and if within that time" notice of a bankruptcy petition is served on him and the debtor is adjudged bankrupt, the sheriff shall pay the balance to the trustee in the bankruptcy who shall be entitled to retain the same as against the execution creditor.

Held: That the fourteen days within which the prescribed notice must be given commence to run from the date of the sale, and not from the date when the last payment on account of the purchase money was received by the sheriff.

Where a bankruptcy petition presented by a company under section 148 of the Bankruptcy Act, 1883, was not accompanied by the affidavit required by Rule 258 of the Bankruptcy Rules, 1886, stating that the person presenting the petition was the authorised public officer or agent of such company.

Held: That the petition was rightly refused.

THIS was an application on behalf of *A. Ross* for an order declaring that he was entitled as against the trustee in the bankruptcy of Messrs. *Cripps, Ross & Co.* to the sum of 349*l.* 8*s.* 6*d.* at present in the hands of the sheriff of Surrey.

The case raised an important question as to the time from which the fourteen days are to run during which the sheriff is to retain the proceeds of an execution in his hands under section 46, sub-section (2), of the Bankruptcy Act 1883.

Section 46, sub-section (2), provides that "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of

the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him."

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In October 1887 judgment for more than 50*l.* was obtained by *A. Ross* against the debtors Messrs. *Cripps, Ross & Co.*, and on January 23rd 1888 execution was levied.

On February 9th 1888 the sale took place, but part of the purchase money was not paid to the sheriff until February 10th.

On February 23rd 1888 a bankruptcy petition against the debtors was presented to the Court but this petition was refused by the clerk on the ground that it was informal.

On February 24th 1888 the informality was remedied and the petition was then duly filed, on which the debtors were adjudicated bankrupt. On the same day notice of the petition was given to the sheriff.

The moneys realised from the sale being claimed by the trustee in the bankruptcy, the execution creditor now applied to the Court for a declaration in his favour.

Herbert Reed: for the execution creditor.

The sale took place on February 9th 1888. The petition was not presented until February 24th 1888. That is more than fourteen days and the execution creditor is entitled to the money. Unless he comes under section 45 or section 46 of the Bankruptcy Act 1883 he has an absolute right. It has never been suggested until now that the time from which the fourteen days in section 46, sub-section (2), is to run is from the time of the receipt of the proceeds. It is from the time of the sale and here the sale took place on February 9th. This is not a new section and

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it would be very curious if from the accident of the purchaser not paying the money for a couple of days the execution creditor should be deprived of his rights. The words in the section "retain the balance for fourteen days" refer back to the words "where the goods of a debtor are sold." It cannot mean from the date of the receipt. The cases of *Ex parte Villars*, *In re Rogers* (L. R. 9 Ch. App. 432; 43 L. J. Bank. 76; 30 L. T. 348; 22 W. R. 397, 603) and *Jones v. Parcell* (L. R. 11 Q. B. D. 430; 52 L. J. Q. B. 672; 49 L. T. 197) clearly show that the retention of the proceeds is to be for fourteen days after the sale. Otherwise the time would depend merely upon accident.

Sidney Woolf: for the trustee.

The question really is, Within what period the notice must be given under section 46, sub-section (2)? I submit that it is sufficient if given within fourteen days of the receipt by the sheriff of the proceeds of sale. Here the sale took place on February 9th but all the proceeds were not received until February 10th. In both the cases cited the judges were really talking of the fourteen days running from the time when the sheriff received the proceeds, but the cases do not really decide the point. In *Ex parte Villars*, *In re Rogers* (L. R. 9 Ch. App. 432) the question only was whether the execution creditor got a good title under what was an act of bankruptcy. Clearly the words of the section are better satisfied if the fourteen days run from the time of the receipt of the proceeds. The fact that the sheriff is to deduct the costs from the proceeds implies that the proceeds are in his hands. Further how can a man "retain" that which he has not got? But I go to another point and I say that the petition in this case was in any event presented within fourteen days. It was taken to the office on February 23rd and presented under section 148 of the Bankruptcy Act 1883 which provides for the presentation of a petition by a corporation or company. But the affidavit required by Rule 258 of the Bankruptcy Rules 1886 to be filed stating that the person presenting the petition is the authorised public officer or agent of the corporation was not in proper form, and the petition was then refused. But that fact would not invalidate the proceeding.

CAVE, J. :

I am of opinion that my decision must be in favour of the execution creditor. I have two points to decide. First, as to the point raised with regard to the presentation of the petition on February 23rd. Now *primâ facie* a petition is presented when it is received and put on the file. It might be a question whether or not a petition might be said to have been presented when all requirements of the Act and Rules having been complied with, the Clerk wrongfully refused to receive it. The question might perhaps arise whether the petition ought not to be said to be presented then, and when that question arises I will deal with it but I shall not say anything about it now. Here on February 23rd the petition was not in order. It was not accompanied by an affidavit as required by Rule 258, which provides that "A bankruptcy petition against or a bankruptcy notice to any debtor to any company or co-partnership duly authorised to sue and be sued in the name of a public officer or agent of such company or co-partnership, may be presented by or sued out by such public officer or agent as the nominal petitioner for and on behalf of such company or co-partnership on such public officer or agent filing an affidavit stating that he is such public officer or agent, and that he is authorised to present or sue out such petition or bankruptcy notice." Consequently the Clerk did right in refusing to receive it as being not in order. The mistake was rectified the following day and it was then presented. I must hold that the petition was presented on February 24th and not on February 23rd.

The other point relates to the construction which ought to be put on section 46 of the Bankruptcy Act 1883. By sub-section (2) "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no

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notice of the presentation of a bankruptcy petition had been served on him." Now nothing is expressly stated as to the time from which the fourteen days are to run. But when we consider the whole subject matter dealt with and the question of convenience and the reason of the section it seems clear that the fourteen days were intended to run from the completion of the sale. Section 46 must be read in the light of section 45 and for the purposes of section 45 the date to be looked at is the date of the completion of the sale. So in section 46, sub-section (2) it is convenient that the same date should apply. Fourteen days *prima facie* means fourteen days from the sale which is the occasion or occurrence on which the duty of the sheriff under the section arises. But it is said that the words of the section are better satisfied if the fourteen days are held to run from the receipt of the proceeds by the sheriff. The sheriff is to "retain the balance for fourteen days," and it is said, How can a man retain that which he has not got? But the words that the sheriff shall retain the balance are not used with reference to the proceeds in his hands. The contrast is between the sheriff retaining it and the sheriff paying it over to a creditor. It is not a question as to having the money in his hands but it really means that the sheriff shall not pay over until fourteen days have elapsed. It is also said that by the section "the sheriff shall deduct the costs of the execution from the proceeds of sale," and that that points to the fact that the fourteen days run from the receipt of the last shilling. But there is really no force in that argument. The deduction may take place at any time. All that is meant is that whether the money is the trustee's or the creditor's the costs of the execution are to be paid. This is what the legislature had in view and public convenience clearly lies in the view I take. The completion of the sale is a matter which is generally known, but with regard to the receipt of the money it is very different. It is quite possible, as I suggested in the course of the argument, that a purchaser might get hold of some article without paying for it and even necessitate his being sued, which would give rise to great difficulty. The general notion of the Act seems to be that a creditor shall not have any benefit of his execution if before the sale is completed a receiving order is made and, further, he shall not have the money

where the goods are sold if within fourteen days a petition in bankruptcy is presented. My judgment is therefore that the fourteen days must run from the completion of the sale and not from the time of the receipt of the money. I declare that as against the trustee, the execution creditor is entitled to this money with costs.

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Application allowed with costs.

Solicitors : *Barton & Pearman*, for the execution creditor.

W. B. Styer, for the trustee.

Cases referred to :—

Ex parte Villars, In re Rogers, L. R. 9 Ch. App. 482 : 48

L. J. Bank. 76 : 80 L. T. 348 : 22 W. R. 897, 603.

Jones v. Parcell, L. R. 11 Q. B. D. 480 : 52 L. J. Q. B. 672 :

49 L. T. 197.

PRACTICE.

BEFORE
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~~~~~  
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IN RE PRYOR, EX PARTE THE BOARD OF TRADE.

*Bankruptcy Act, 1883, section 57, sub-section (3).*

*Bankruptcy Rules 1886. Rule 124.*

*Costs—Taxation—Notice by Board of Trade to Review—Solicitor employed by  
Trustee—Administrative Work—Scale of Charges.*

Although under section 57, sub-section (3) of the Bankruptcy Act 1883 a trustee may with the permission of the committee of inspection employ a solicitor to do "any business which may be sanctioned by the committee," where a solicitor so employed only does administrative work he is not entitled to charge solicitor's charges in respect thereof, but only such charges as are fair and reasonable having regard to the work so done.

THIS case was referred by the Bankruptcy Taxing Master of the High Court to Mr. Justice CAVE for his decision in respect of the taxation of certain bills of costs of Messrs. *Hooper & Co.* solicitors employed by the trustee in the bankruptcy.

In 1886 a petition was presented against the bankrupt *Samuel Pryor* in the Bedford County Court and a trustee was subsequently appointed.

The bills of costs in question of Messrs. *Hooper & Co.* who were employed as solicitors by the trustee extended during 1886, 1887, and part of 1888 and were allowed by the County Court Registrar.

Notice was given, however, by the Board of Trade under Rule 124 of the Bankruptcy Rules 1886 that the Board required this taxation "to be reviewed by a Bankruptcy Taxing Master of the High Court," when the following objections to the taxation were submitted:—

"The Board of Trade object to the allowance by the said Registrar upon the said taxation as aforesaid of any part of the said costs as payable out of the estate of the said bankrupt and for the following reasons:—

- (a) The sanctions given by the Committee of Inspection to the trustee to employ a solicitor as certified in the certificate a copy of which is attached hereto and marked "A" are *ultra vires* and give you no right to be paid out of the said estate any part of the costs incurred thereunder.
- (b) It does not appear from the Record Book that any further or other sanctions or permissions have been given by the Committee of Inspection to the trustee to employ a solicitor in the matter.
- (c) The whole of the items of the said Bill of Costs which have been allowed by the said Registrar are either for work done under the said sanction or for work done for which no sanction or permission was given.

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The grounds upon which it is contended by the Board of Trade that the said permissions and sanctions so certified to have been given by the Committee of Inspection are *ultra vires* and give to you no right to be paid out of the said estate any part of the costs incurred thereunder are shortly as follows :—

- (a) The said work so permitted and sanctioned is in no sense legal work requiring for its due performance the assistance of a solicitor but it is administrative work which the ordinary administrative duties of the trustee required him to perform and which by Statute and Rules is required to be performed by the trustee himself.
- (b) No power is given to the Committee of Inspection by section 57, sub-sections (2) and (3), of the Bankruptcy Act 1883, to permit or sanction the trustee to employ a solicitor to do work which is in no sense legal work requiring for its due performance the assistance of a solicitor; or work which the ordinary duties of the trustee require him to perform and which by Statute or Rules are required to be performed by the trustee himself."

The certificate of the sanction of the Committee of Inspection was in the following form :—

"We the undersigned members of the Committee of Inspection hereby certify that we sanctioned the trustee in doing the following things and that we authorised him to employ a solicitor to assist

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him therein :—Declare a dividend and make all requisite arrangements incidental thereto, and distribute the same, and give all proper notices and issue all proper statements, and apply for and do all necessary acts for and incidental to obtaining the release of the trustee, and for investigating proofs tendered, and for winding up the bankruptcy, auditing the accounts and closing the matter.

GEORGE ASHBY WOTTON.

THOMAS KINMAN."

The Bankruptcy Taxing Master of the High Court stated his opinion :—"I agree that the trustee can only employ a solicitor for strictly legal work notwithstanding the sanction of the committee,"—but he referred the question to Mr. Justice CAVE for his decision.

*Muir Mackenzie* : for the Board of Trade.

The bills were for administrative work. The items include calculating dividend on proofs, paying dividends and taking receipts &c. The question is whether the trustee can with sanction employ and charge against the estate the cost of a solicitor to do work which the Statute and Rules say he is to do himself.

*De Courcy Atkins* : for the solicitors.

What I submit is that a solicitor can be employed for both administrative and legal work, and he is entitled to charge administrative prices for administrative work and legal prices for legal work. Section 57 of the Bankruptcy Act 1883 provides that "The trustee may with the permission of the Committee of Inspection, do all or any of the following things . . . (3) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the Committee of Inspection." (Counsel also referred to the duties of the trustee under various sections of the Act).

CAVE, J. :

Judgment.

The Act is clear that the trustee with the consent of the committee may employ a solicitor to do "any business." The only limit to that seems to be that he must not employ an agent to do

work for which he receives remuneration (see section 73). Of course if the solicitor only does clerk's work he will not be paid as a solicitor but as a clerk. He cannot charge 6s. 8d. for example for posting a letter. In this case a question might perhaps arise as to the sufficiency of the permission. The course which I think it best to take will be for me to refer the matter back to the taxing master with the expression of my opinion that the solicitor cannot charge solicitor's charges for administrative work but only such charges as are fair and reasonable having regard to the work done. I leave the taxing master also to decide as to the costs of the application.

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Solicitors : *The Solicitor to the Board of Trade*, for the Board of Trade.

*Hooper & Co.*, for the solicitors.



IN RE THACKRAH, EX PARTE HUGHES & KIMBER.

*Bankruptcy Act, 1883, section 44, sub-section (iii.).*

*Reputed ownership—Order and disposition—Hiring of Printing Machinery—  
Type—Custom of Particular Trade.*

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*Held* : That a custom exists in the printing trade to let printing machinery on hire so as to exclude the doctrine of reputed ownership in the event of the bankruptcy of the hirer.

But such custom does not at present extend so as to include the hiring of type.

THIS was an application on behalf of Messrs. *Hughes & Kimber*, printers' engineers, for an order directing the official receiver to pay over to them the sum of 187l. 4s., being the proceeds of the sale of

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certain printing machinery, type, &c., supplied to the bankrupt on the hire system.

The case raised a question of some importance in the printing trade as to the existence of such a universal custom in such trade of lending machinery and type on hire, so as to exclude the doctrine of reputed ownership in the event of the bankruptcy of the borrower.

On March 6th 1887 Messrs. *Hughes & Kimber* supplied the bankrupt, who carried on business as a printer and stationer in Aldersgate Street, with certain printing machines, gas engine with shafting and belting, type frames, type, and other printers' appliances, on the hire system.

In October 1887 the bankrupt issued a circular to his creditors and bankruptcy proceedings were subsequently taken, a receiving order being made against him on May 9th 1888.

On May 15th 1888 Messrs. *Hughes & Kimber* claimed from the official receiver the printing plant, &c.; but on May 28th the official receiver sold the bankrupt's stock in trade together with the machinery and type lent to him, the machinery realising 92*l.* 18*s.* 4*d.* and the type 44*l.* 5*s.* 8*d.*

These sums, amounting together to 137*l.* 4*s.*, were now claimed by Messrs. *Hughes & Kimber*, the official receiver seeking to retain them on the ground that the machinery and type were in the order and disposition of the bankrupt at the date of the receiving order within section 44, sub-section (iii) of the Bankruptcy Act 1883.

*Powell*: for Messrs. *Hughes & Kimber*.

I have to show that there is a well-known custom in the printing trade to hire out machinery, type and plant generally. I propose to call ample evidence:

[*R. G. Kimber*, secretary to the claimant company, said:—"I have been in the trade for twenty-seven years. I have traced back and find that since 1875 we have been in the habit of letting out printing machinery on the hire system, and it may be we did so before that. It is a well known thing. We have not let out much type, but in this case there was type."

*W. Powley*, London manager to *Furnival & Co.*, printers' engineers and machinists, Redditch, said :—" I have been twenty years in the trade. Messrs. *Furnival & Co.* have a very large business. They let out machinery on the hire system. They have done so to my own knowledge for the last eleven years when I became their London manager, and they were doing so when I joined them. We have a form of agreement and have now about a hundred hire agreements running in London alone. I know other firms do the same thing."

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*T. Taylor*, printers' auctioneer, Lincoln's Inn Fields, said :—" I have been connected with the printing trade for twenty-five years and have myself let out printing machinery on the hire system. I have also let out a little type and have some out at the present time. I believe all firms do it and the custom is very prevalent."

*J. Rose*, Manager to Messrs. *Spicer Brothers*, Paper Makers, said :—" I am quite aware of the custom of hiring printing machinery and I have known it for at least ten years. The fact that a man has plant and machinery on his premises is certainly not taken by us in the paper trade as any evidence that it belongs to him."

*J. Alford*, town traveller to Messrs. *Shakell & Edwards*, Printing Ink Manufacturers, said :—" I have been in the trade all my life. The custom of hiring machinery is very prevalent. For my own part I do not think type is much hired."

*J. Anderson*, typefounder, said :—" Printing machinery is let out on hire very largely. We have let out type, but not in many cases. We rather object to it."

*H. Sanders*, typefounder, Judd Street, said :—" I have only on one occasion let out type on hire. I know printing machinery is largely hired."

*C. Hammond*, printers' broker and typefounder, said :—" I have let out printing machinery on the hire system and it is frequently done. As to type I have let it out but only on two occasions."

*W. Hole*, manager to *H. S. Cripps & Co.*, Nottingham; *J. Esson*, Printers' Engineer, Fetter Lane; *D. T. Powell*, printing machine manufacturer, also spoke of the alleged custom.]

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*Muir Mackenzie* : for the official receiver.

I submit that as regards the type at any rate I have no case to answer.

[CAVE, J. : No ! There is clearly no case as to the type.]

Then as to the machinery I propose to call evidence.

[*W. Izard*, senior partner in the firm of *Izard, Daw & Izard*, Auctioneers and Valuers, said :—" I know the customs in trades of all kinds. In particular I have been connected with sales and valuations of printers. I know there is a custom to hire machinery but only to a limited extent. It is not a general custom. I mean that I know of certain things like Otto gas engines and guillotine machines, &c., being hired but not machinery generally."

*H. E. Boot*, of the firm of *Boot & Son*, printers, said :—" I have been eighteen years in the trade. I know that printing machinery is hired, but it is not a custom. In the majority of places the plant would belong to the occupier.

[CAVE, J. : Would you lend your own money on the strength of it without any enquiry ?]

If it was a big office I might, but if it was a small one I should not."

*W. Harrild*, of the firm of *Harrild & Son*, printing engineers and dealers in printing machinery, said :—" I have been in the trade for twenty-five years. We do hire out machinery in isolated cases, but our rule is not to do so. We have had about twelve hiring cases in nine years, and in the meantime we have actually sold over two thousand machines."]

The applicants have proved nothing like a notorious custom. All that has been shewn is that where certain persons cannot pay certain firms allow hiring agreements. But the best firms set their faces against it. The most that has been proved is that in certain cases bargains are made by which the goods may be hired instead of paid for. That may be said of almost every trade. Even as



regards the machinery the applicants have not satisfied the onus of proof as required by your Lordship in *In re Horn, Ex parte Nassan* (see *ante*, Vol. III. p. 51).

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CAVE, J. :

I think it is reasonably established that there is a practice of hiring printing machinery. The practice of hiring is creeping into use more and more and getting more and more established and more and more known. With regard to type it has in my opinion not yet come to the point when persons generally would know that there was a custom to hire type. But when we come to the machinery the case takes a different aspect. A large number of witnesses have been called for the applicants who say that hiring agreements exist, and it is also to be noticed that every witness for the respondent was aware that these hiring agreements existed. Not one of the witnesses would have given credit merely from seeing the printing machinery in the possession of a printer without some enquiry. So also if any question had been asked of those witnesses by persons not in the trade they would have answered that some enquiry ought to be made. The moment you get to that I think you are entitled to say that a practice is well known, and that persons do not give credit on the strength of possession. In this case I think the evidence for the applicants was strong, and it is affirmed moreover by the evidence for the respondent. As to the sum of 92*l.* 18*s.* 4*d.*, the proceeds of the machinery, the official receiver must pay that to the applicants. As to the rest the motion must be dismissed, and each party having succeeded in part I shall make no order as to costs. The official receiver may take his costs out of the estate.

*Order accordingly.*

Solicitors : *A. S. Edmunds*, for Messrs. Hughes & Kimber.  
*W. W. Aldridge*, for the official receiver.

Case referred to:—

*In re Horn, Ex parte Nassan*, see *ante*, Vol. III. p. 51.

## PRACTICE.

BEFORE  
MR. JUSTICE  
CAVE.  
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July 2nd.

IN RE DOWSON, EX PARTE JAYNES.

*Bankruptcy Act, 1883, section 121.*

*Bankruptcy Rules, 1886. Rule 112.*

*Costs—Small Bankruptcy—Review of Taxation—Costs “payable out of the estate”—Scale.*

*Held:* That Rule 112 of the Bankruptcy Rules 1886 which provides that where the estimated assets of a debtor do not exceed the sum of three hundred pounds a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, applies to costs which, by the provisions of the Act, are payable out of the estate.

But the rule does not apply to costs which are in the discretion of the Court, and which in consequence of the Court exercising its discretion in one particular way may come to be paid out of the estate.

The rule, therefore, does not apply to proceedings against third parties outside the bankruptcy.

THIS was a motion to review a taxation of costs.

On December 8th 1887 *W. Jaynes*, the present applicant, appealed to the Divisional Court in Bankruptcy from an order of the learned Judge of the County Court at Northallerton by which he directed the said *Jaynes* to repay to the official receiver as trustee in the bankruptcy the sum of 21*l.* alleged to have been received as a fraudulent preference, with costs.

The Divisional Court allowed the appeal and set aside the order of the County Court, directing that the appellant be repaid the 21*l.* with costs here and below. And the Court further ordered that the official receiver as trustee should be at liberty to take the costs out of the estate.

The bankruptcy in question was a small bankruptcy and it was contended by the official receiver that the costs must be taxed on the lower scale under Rule 112 of the Bankruptcy Rules 1886 which provides “(1) The scale of costs set forth in the appendix, and the regulations contained in such scale, shall, subject to these

Rules, apply to the taxation and allowance of costs and charges in all proceedings under the Act and these Rules. (2) Subject to the provisions of No. 1 of the scale of costs, where the estimated assets of the debtor do not exceed the sum of three hundred pounds, a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely, three-fifths of the charges ordinarily allowed, disbursements being added; and if in error any charges have been allowed or paid on the higher scale, and the gross proceeds of the assets shall be ascertained not to exceed three hundred pounds, the excess shall be disallowed, and if paid shall be repaid to the trustee."

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The appellant *Jaynes* now applied to the Court for its decision.

*Ringwood* : for Mr. Jaynes.

The scale of costs applies to costs of the solicitor to the trustee and the solicitor to the debtor. It cannot apply to costs to be paid by the trustee to third parties. It was not intended to apply to cases where the trustee as an ordinary litigant takes proceedings against an outside person. Otherwise great injustice would be done to persons against whom the trustee proceeds. If the trustee or official receiver is successful he will get his costs on the higher scale. Here the present applicant, in the Court below was ordered to pay costs on the higher scale. But now it is said that he is only entitled to receive costs on the lower scale. (Counsel referred to *In re Glanville, Ex parte the Trustee*, see ante, Vol. II. p. 71 : *Ex parte Angerstein, In re Angerstein*, L. R. 9 Ch. App. 479 ; 30 L. T. 446 ; 22 W. R. 581.)

*Muir Mackenzie* : for the official receiver as trustee.

In holding that the costs must be on the lower scale the taxing master was only following the practice which has prevailed since Rule 112 was passed.

[CAVE, J.—The words "payable out of the estate" in the rule surely mean "payable according to the Act out of the estate." These costs are not so. If you had succeeded you would have had full costs out of this man.]

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JAYNES,  
Judgment.

CAVE, J. :

I think the Master has not put the right construction on Rule 112 and that Rule 112 was intended to apply to costs, which, by the provisions of the Act are payable out of the estate. There are plenty of cases of that kind of which numerous examples are to be found in the scale of costs itself, and wherever that is so, undoubtedly there the costs which by the Act are to be paid out of the estate, are to be paid on the lower scale. But I do not think the rule was ever intended to apply to costs which are in the discretion of the Court, and which, in consequence of the Court exercising its discretion in one particular way may come to be paid out of the estate. It would involve it seems to me a monstrous piece of injustice that the trustee might initiate legal proceedings against the third party in all these cases under section 121—because it must apply not only to cases where the official receiver is trustee, but where the trustee is appointed by the creditors in place of the official receiver—and may therefore commence proceedings if this contention is right, with a comfortable feeling that if he wins he would get full costs, whilst if he loses he would only have to pay three-fifths. I cannot conceive that to be the meaning of the Act. There is another which is a more simple and natural meaning to be attributed to it, and that is the meaning which I think it must bear.

The case must go back to the master to review his taxation with my direction that under the circumstances of this case he is to allow the appellant his full costs and also—I do not suppose it will come before him, because he is only taxing as between the trustee and the appellant—but at all events I express my opinion that in such a case as this, the trustee having paid the costs upon a full scale in accordance with the direction of the Court and being allowed to recoup himself out of the estate, he should be allowed to recoup himself what he has actually paid.

*Application allowed with costs.*

Solicitors : *H. B. Roberts*, for Mr. Jaynes.

*The Solicitor to the Board of Trade*, for the official receiver.

## PRACTICE.

IN RE BULLEN, EX PARTE ARNAUD.

*Bankruptcy Act 1883, section 28.**Discharge—Condition with respect to after-acquired property—Debtor's petition—  
One creditor—Right of debtor to petition.*COURT OF  
APPEAL.BEFORE THE  
MASTER OF  
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It would seem that the Court ought not as the condition upon which it grants a bankrupt his discharge to require such bankrupt to consent to judgment being entered against him for the balance of the provable debts under section 28 sub-section (6) of the Bankruptcy Act 1883, unless there is a probability that something is likely to be gained by it by reason of the fact of such bankrupt becoming possessed of some after-acquired property.

*Quere* : Whether a debtor who has only one creditor is entitled to file his own petition under the Bankruptcy Act 1883.

But where the petition and adjudication were both unchallenged, and on application by the bankrupt for his discharge it was alleged against him that by reason of the fact that he had only one unsecured creditor the filing of the petition was an act of misconduct on his part which the Court was bound to take into consideration.

*Held* : That the petition and adjudication having been both unchallenged the Registrar was right in refusing to consider the alleged matter on application for discharge.

THIS was an appeal on behalf of *J. Arnaud*, a creditor in the bankruptcy from an order of Mr. Registrar Giffard by which he suspended the discharge of the bankrupt *R. Bullen* for three months.

The ground of the appeal was that the learned registrar ought not to have granted any order of discharge except upon the condition of judgment being entered against the bankrupt for the balance of the provable debts under section 28 sub-section (6) of the Bankruptcy Act 1883, it being alleged that the whole bankruptcy proceedings were an abuse of the process of the court and that the application for discharge was an attempt to free the bankrupt from liability in respect of one debt.

On January 6th 1887 judgment was obtained by *Arnaud* against

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the bankrupt in an action to recover the sum of 653*l.* money lent, and in December 1887 on the failure of certain negotiations between the parties execution was issued.

The debtor thereupon filed his petition, the statement of affairs showing *Arnaud* to be the only unsecured creditor, all the other creditors of which there were only two or three being fully secured. The assets amounted to 56*l.*, less preferential debts 12*l.* 10*s.* leaving 43*l.* 10*s.*—the amount to be administered.

The debtor was adjudicated bankrupt and on application for discharge the report of the official receiver stated that the bankrupt had continued to trade after knowing himself to be insolvent and had not kept proper books and on those grounds the registrar suspended the discharge for three months.

It was contended, however, on behalf of the creditor *Arnaud* that the proper order would be to direct judgment to be entered against the bankrupt in respect of the debt due under section 28 sub-section (6) and on that ground he now appealed from the registrar's order.

*E. Cooper Willis, Q.C. (F. C. Willis, with him):* for the creditor.

This application for discharge was simply an attempt to white-wash a man from one debt. *Arnaud* was the only creditor and if a discharge was granted at all it should only have been on condition of judgment being entered against the bankrupt under section 28 sub-section (6). The debtor kept a public-house, and *Arnaud* was the only unsecured creditor. The only other debts were a 3*l.* water-rate, and two or three creditors such as the brewer and distiller who were fully secured. The object of the debtor in filing his petition was not to distribute the property, for creditors he had none, but simply to debar *Arnaud* from his execution.

[THE MASTER OF THE ROLLS.—Do you say that a man cannot be made a bankrupt if he has only one creditor?]

Being made and making himself is a different thing. What I do say is that a man cannot present a petition for the purpose of

getting rid of one debt. The idea is that the whole property may be divided amongst the creditors. A man unable to pay his debts may petition, not one who has a single debt.

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[BOWEN, L.J.—I could understand your proposition if there were a chance of the debtor doing anything better. Must you not show that by the debtor not going into bankruptcy the creditor would be better off?]

What the debtor did was an abuse of the Bankruptcy Act and the adjudication should never have been made. (Counsel referred to *Ex parte Gaitskell*, 3 Dea. 635 : *Ex parte Staff*, *In re Staff*, L. R. 20 Eq. 774 ; 38 L. T. 40 ; 28 W. R. 950 : *Ex parte Aaronson*, *In re Aaronson*, L. R. 7 Ch. Div. 713 ; 47 L. J. Bank. 60 ; 38 L. T. 243 ; 26 W. R. 470.)

[BOWEN, L.J.—With regard to this point I will just say, may not the line be whether there is reasonable probability of the creditor getting more by the debtor not going into bankruptcy?]

Further by section 28, sub-section (2), of the Bankruptcy Act 1883 on hearing an application for discharge the Court must take into consideration the "conduct" of the debtor. The filing of this petition was itself an act of misconduct on the part of the debtor. I submit that having regard to the way this petition was presented and to its object, if the Court grants a discharge at all it would only do so under section 28, sub-section (6). That would do justice and would be a right order. The judgment could not be put in force without leave.

[THE MASTER OF THE ROLLS.—Here the petition and adjudication were both unchallenged and now you say the man is not to have his discharge because he presented the petition.]

*A. à B. Terrell* : for the bankrupt was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER):

A great deal of time has been taken up with an argument which Judgment.

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goes to the question whether under such circumstances as are in this case an adjudication could be set aside. Now I shall not express any opinion upon that in this case. I have formed an opinion but I shall not now say what it is. Here there was a petition and an adjudication and in this appeal that adjudication cannot be challenged. The only question is whether in this case we can come to the opinion that the Registrar has exercised jurisdiction in a case where he had no jurisdiction or having jurisdiction has exercised his discretion improperly. The Registrar heard the whole case and the points were put to him and he expressed the opinion that the debtor had done nothing wrong except that he had continued to trade after knowing himself to be insolvent and that he had not kept proper books. In respect of those wrong acts the Registrar has given punishment and no challenge was made as in respect of that punishment. Now it is alleged that besides this the Registrar ought to have made the order under section 28, sub-section (6), and that he has exercised his discretion so improperly in that matter as to cause us to interfere. I can see nothing which could oblige the Registrar to make the order under section 28, sub-section (6), or which would cause me to have made such an order if I had been in his place. There is nothing whatever in the case to induce me to say that an order under section 28, sub-section (6), ought to have been made. The debtor has done nothing dishonest. He went on trading after knowing he was insolvent which must not be done. It is an offence against the bankruptcy laws. So also he did not keep proper books and that is a serious offence against the bankruptcy laws and one which if persevered in will generally cause a man to become bankrupt. But he is punished for those offences and in my opinion the punishment imposed is sufficient in the circumstances of this case.

LINDLEY, L.J.:

I see no reason for differing with the Registrar. The point raised whether a man who has only one creditor can get relief from the claims of that one creditor is an important one and as to that I say nothing. But it must not be forgotten that here it is not true that there was only one creditor. There were secured



creditors and secured creditors must not be looked upon as if they were nothing. No attack was made on the petition and adjudication. The bankruptcy is at the last stage. Even considering the conduct of the bankrupt what is there except that the assets are small. There is no evidence at all that the man will ever have any after-acquired property and under those circumstances I think *primâ facie* one ought not to tie a man up by such a judgment as that under section 28, sub-section (6). It would give rise to great difficulties and possibly litigation. A question is almost sure to arise between the judgment creditor and any new creditors and a man ought not to be placed in such a position unless something is likely to be gained by it.

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BOWEN, L.J.:

I am of the same opinion.

*Appcal dismissed.*

Solicitors: *E. J. Stannard*, for the creditor.

*E. W. Reeves*, for the bankrupt.

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THE ROLLS,  
LINDLEY, L.J.,  
BOWEN, L.J.  
1888.July 13th and  
16th, and  
August 3rd.

IN RE FINLEY, EX PARTE HANBURY.

*Bankruptcy Act, 1883, section 55.**Disclaimer of Lease—Sub-lease by way of mortgage—Vesting order—Exclusion of sub-lessee—Application by original lessor.*

*Held:* That where a trustee in bankruptcy disclaims leasehold property of the bankrupt which the bankrupt has mortgaged by subdemise, the Court has power under section 55 of the Bankruptcy Act 1883, to make an order on the application of the original lessor excluding the sub-lessee from all interest in and security upon the property unless he elects to take a vesting order vesting the property in him subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of such property at the date of the filing of the bankruptcy petition.

*Quære:* Whether if such a vesting order is made the sub-lessee will become liable as if he were an assignee, or whether he will become liable under the original lease as if he had been the original lessee.

The case of *In re Cock, Ex parte Shilson* (see ante p. 14) approved and followed.

THIS was an appeal on behalf of *C. H. Hanbury*, a mortgagee by sub-demise of certain property of which the bankrupt *John Finley* was lessee, against an order of Mr. Registrar Brougham by which he directed that the said *C. H. Hanbury* should be excluded from all interest in and security upon the property comprised in the said lease unless within fourteen days of the service of the order upon him he elected to take an order vesting in him the whole of the property comprised in the lease subject to the same liabilities and obligations as the bankrupt was subject to in respect of the property at the date when the bankruptcy petition was filed.

The application to the registrar for the order now appealed from was made by the Clothworkers' Company who were the lessors of the property in question, and the present case amounted really to an appeal from the decision of the Divisional Court in the case of

*In re Cock, Ex parte Shilson* (see *ante* page 14) by which it was held that the court had power under section 55 of the Bankruptcy Act 1883 on the application of the landlord to make such an order as that made in the present case.

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On July 5th 1882 a lease was granted by the Clothworkers' Company of the White Swan public-house, Tudor Street, to the bankrupt *John Finley* for eighty years at a yearly rent of 250*l.* and subject to the ordinary covenants and conditions.

On July 12th 1882 a mortgage by demise for eighty years less three days was made to *C. H. Hanbury* one of the firm of well-known brewers as a security for 6,600*l.*; and there was a provision that the reversionary three days should be held in trust for the mortgagee.

On August 27th 1887 a petition was presented against *Finley* upon which he was adjudicated bankrupt, and on December 21st 1887 an order was made for the disclaimer of the lease by the trustee in the bankruptcy who accordingly disclaimed.

On April 18th 1888 the Clothworkers' Company as the original landlord applied to the court for an order that unless the mortgagee should declare his option to take the lease subject to the same liabilities and obligations as the bankrupt, he should be excluded from all interest in the property.

On May 2nd 1888 the order was made, and from that order Messrs. *Hanbury* now appealed.

*Gregory (Lumley Smith, Q.C. with him)* : for *C. H. Hanbury*.

I say first that under section 55 of the Bankruptcy Act 1883 the court has no power to make an order such as this at the instance of or in favour of the landlord. Further I submit that the court has no power to make it at the instance of anybody except of the mortgagee himself. Sub-section (2) of section 55 says that a disclaimer shall not affect the rights and liabilities of any person except the bankrupt and his trustee. I admit that this case is practically an appeal from *In re Cock, Ex parte Shilson* (see *ante* page 14; L. R. 20 Q. B. D. 348). Counsel also referred to *Ex parte Walton, In re Levy* (L. R. 17 Ch. Div. 746; 50 L. J. Ch. 657; 45 L. T. 1; 30 W. R. 395).

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*Millar, Q.C. (Horne with him):* for the Clothworkers' Company.

The order appealed from is based on the first words of the proviso of sub-section (6) of section 55. After the disclaimer the persons interested in the property are: (1) the persons claiming under the bankrupt, as, for example, mortgagees by demise and sub-lessees; (2) those claiming side by side with the bankrupt, as, for example, sureties; (3) the landlord. These are all the persons interested in the disclaimed property and the Bankruptcy Act 1883 deals with each of those three classes. Sub-section (2) of section 55 is simply dealing with the disclaimer and not with any subsequent proceedings. Sub-section (6) in terms points to proceedings after disclaimer. It is argued that sub-section (2) prevents my success because I am seeking to affect the rights of another person beside the bankrupt and his trustee: viz. the mortgagee by demise, and if the thing stopped there I admit that I could not touch the mortgagee except, perhaps, by distress or ejectment. But I am not dealing with sub-section (2) but with subsequent proceedings after disclaimer which do affect the mortgagee. In sub-section (6) the proviso does affect other persons besides the bankrupt and the trustee because in terms other persons are affected. A landlord has always been regarded as a person coming within the definition "any person interested in any disclaimed property" under the Bankruptcy Act 1869. (Counsel referred to *Ex parte Lovering, In re Jones*, L. R. 9 Ch. App. 586; 48 L. J. Bank. 94; 30 L. T. 621: *Ex parte Moore, In re Stokoe*, L. R. 2 Ch. Div. 802; 24 W. R. 720.)

*August 3rd.*

LINDLEY, L.J.: delivered the judgment of the Court.

Judgment.

This is an appeal from an order made by the Divisional Court in a case arising under section 55 of the present Bankruptcy Act.

The order in question is this: It is ordered "That the said Charles Haddington Hanbury the said mortgagee by demise under the said Indenture dated the 12th day of July 1882 be excluded from all interest in and security upon the property comprised in the said lease unless he shall within 14 days from the service of this order upon the

said Messrs. Hanbury, Hutton and Whitting, his solicitors elect to take and apply for an order vesting in him the whole of the property comprised in the said lease subject to the same liabilities and obligations as the said John Finley was subject to under the said lease in respect of the said property at the date when the bankruptcy petition in this matter was filed."

Now the short facts of the case are these. On July 5th 1882 a lease was made to the bankrupt for eighty years at 250*l.* a year, rent. On July 12th in the same year a mortgage for eighty years less one day or three days—I forget which—was made to Mr. Hanbury as a security for 6,600*l.* and there was a provision that the reversionary day or three days should be held in trust for the mortgagee. Then there was a second mortgage to which one need not further allude, and on August 27th 1887 a petition for adjudication in bankruptcy was presented. There was an adjudication of bankruptcy, and on December 21st 1887 an order was made for the disclaimer of this lease by the trustee, and he did accordingly disclaim. Now after that on April 18th 1888 the lessor, the original landlord, applied to the Court for the order which in substance is the one which was made, and which I read. The question is whether that order is right.

Now the point turns, as I have already said, on section 55 of the Bankruptcy Act 1883, which is a very long section and which has replaced similar provisions, or provisions more or less to the same effect, in the previous Bankruptcy Act, and it has introduced a new method of dealing with onerous property. It is more or less framed upon the old lines, but there are some clauses in the present Act, which are not to be found and the like of which are not to be found in the old Act. It is important to bear that in mind in considering what weight ought to be attached to previous decisions upon the previous Act of Parliament. This is a new enactment altogether. Now section 55 is a very long one and it is divided into seven sub-sections, the most material of which are the first, the second and the sixth. The first runs thus: "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable," and so on. One need not read the rest of it. Then

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“the trustee”—I am reading it shortly—“notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.” That is the first thing. That enables the trustee to get rid of the property by disclaimer. Then sub-section (2) says what the effect of the disclaimer is to be:—“The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property”—property there means, I take it, assets—“in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.” The effect of that, speaking roughly and generally is plain enough. It is to put an end to both the rights and the liabilities of the bankrupt and his trustee. That is the primary object. By the disclaimer the trustee elects to have nothing to do with the property which is an onerous property, and nothing can be got for the creditors by taking it. He is at liberty to disclaim it, and the effect of the disclaimer is to extinguish all the rights and liabilities both of the bankrupt and of the trustee himself. Then the last words show that notwithstanding that extinction of the rights and liabilities of the bankrupt and of the trustee, the rights and liabilities of third persons are to remain untouched. Then sub-section (3) is immaterial. Sub-section (4) is important for a reason which I will give presently:—“The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not.” Then the section goes on with regard to a matter which I need not read. The importance of that sub-section is that we have there the expression “Any person interested in the property,” and it has been held under this sub-section (4) that a lessor is a person interested in the property and is entitled therefore to call upon

the trustee to disclaim. The case which decided that was the case of *Ex parte Mackay* (L. R. 14 Q. B. D. 401). Then we come to sub-section (6) which is the most important of all. This sub-section (6) assumes a disclaimer and proceeds upon the assumption that there has been a disclaimer with the effects and consequences pointed out in sub-section (2). It now proceeds to deal with the property and to authorise the Court to make orders vesting the property in other people. Sub-section (6) is itself sub-divided into two clauses, the second of which begins with the words :—"Provided always." It is necessary to read it. "The Court may on application by any person either claiming any interest in any disclaimed property"—which is the expression we had before in sub-section (4) and which has been held by the Divisional Court to include a lessor, as to which I will say something presently—"or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or the delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose." That is the general enabling clause so far as vesting orders are concerned. Then we come to a proviso applicable to leases. "Provided always that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either

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personally or in a representative character and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances and interests created therein by the bankrupt." Then the sub-section (7) is that "Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

Now this clause is an extremely complicated one, and in order to see how it would work it has been necessary to go through it with some care. I will point out shortly how the section works in two cases. First of all the case of a simple lease, and secondly the case we have to deal with of a lease with a sub-demise by way of mortgage. Now the first matter which one has to consider is in what sense the word "property" is used in section 55, and having studied that section with all the care I can it appears to me that the word "property" is used in rather an inaccurate sense. It is sometimes used to denote the thing owned—the land or shares or what not; it is sometimes used to denote the bankrupt's interest in the thing—whether it is a leasehold interest or some other interest; and it is sometimes used apparently indiscriminately to denote both of those things. There is an ambiguity about the expression but in some cases, as for example the first, it is obvious that "property" means what is owned—the thing owned, be it land, or be it shares, or be it anything else.

The next point to consider is whether the lessor can be regarded as a person claiming any interest in any disclaimed property under sub-section (6). Mr. Justice CAVE in the case of *Ex parte Turquand* (L. R. 14 Q. B. D. 405) doubted whether a lessor was within that expression but in the more carefully considered case of *In re Cock, Ex parte Shilson* (see ante page 14) the same learned judge with the assistance of Mr. Justice SMITH came to the conclusion that a lessor was a person claiming an interest in the disclaimed property within sub-section (6). It is quite obvious that a lessor is very much interested in the observance by the lessee of the conditions and covenants contained in the lease, and he has a very substantial interest in the property disclaimed in whatever sense you take the expression "disclaimed property." Having



considered the cases and the doubts expressed in *Ex parte Turquand* it appears to us that the view ultimately adopted by the Court in *In re Cock, Ex parte Shilson*, as to this point is correct, and that a lessor is a person claiming an interest in the disclaimed property both under sub-section (6) and under sub-section (4) to which I have already alluded.

Now the operation of those clauses in the simple case of a lease is not very difficult to ascertain. If there is nothing more than a lease, and the lessee becomes bankrupt, the lease determines his interest under sub-section (2). He gets rid of all his liabilities, and he gets rid of all his rights in the case of a disclaimer. There is no provision for merger or anything of that kind, but the natural effect, and the legal effect of sub-section (2) is that the reversion will become accelerated. There is nothing to vest it in the landlord that I can see. But the lessor may want delivery of possession. If he wants it, it appears to me he can get it under sub-section (6).

Then under sub-section (7) the lessor if injured by the disclaimer can prove against the bankrupt's estate for such damages, if any, as he has sustained by the disclaimer. That is the simple case of a lease.

Now I have made these remarks simply by way of preface to the more complicated case with which we have to deal. We have to deal with a lease, and a sub-lease by way of mortgage. I leave out "by way of mortgage" for the present and treat it simply as the case of a lease and a sub-lease. This case resolves itself into two divisions. First of all we have to consider what is the result if the sub-lessee becomes bankrupt. Now, supposing the sub-lessee to become bankrupt—which is not this case—then as regards the sub-lessee and the sub-lessor the same consequences will follow as when there is a lease and the lessee is bankrupt and the original lessor will not be affected in any way.

Then we have to consider the more difficult case of what takes place when the first lessee is bankrupt. Here we have to consider three cases. First of all we have to consider the case as between the lessee and his lessor. As regards them the consequences will be the same as if there were no sub-lease at all. As between the lessee and the sub-lessee the consequences will apparently be these.

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The lessee's rights and interests and liabilities determine under sub-section (2) and consequently the extinction of his rights involves the extinction of the sub-lessee on his covenants.

We have next to consider the case between the lessor and the sub-lessee. Now first of all, their rights and liabilities are preserved under sub-section (2); and subject to what the effect of a vesting order may be, the case will stand in this way—that the sub-lessee although freed from his covenants to his own immediate lessor must perform his lessor's covenants or be liable to be distrained upon and to be ejected. That would be obviously his case and that was the position in which he found himself in the case which was so much considered under the old Act—I mean *Hill v. The East and West India Dock Company* (L. R. 9 App. Cas. 468). That is not an enviable position and it is a strange position in which to leave him. But then this Act goes further. It by no means stops with sub-section (2) because sub-section (6) has to be considered. I am still dwelling upon the rights as between the original lessor and the sub-lessee. The sub-lessee evidently can apply for an order vesting the lease in him under sub-section (6). There is no controversy about that. Then the question is whether the lessor can apply for an order vesting the lease in the sub-lessee. It appears to me for the reasons I have stated—that is to say having regard to the meaning of the word "property" and the meaning of the words "person claiming an interest in the property"—that the lessor can, under this Act, apply for such an order. But whether the sub-lessee applies or whether the lessor applies in either case the vesting order can only be made in favour of the sub-lessee, subject to the covenants and so on in the lease, and if the sub-lessee will not take the property on those terms which of course he need not do, then these consequences appear to follow. First of all the sub-lessee is excluded from all interest in the property disclaimed, and which he declines to accept upon those terms. But whether the last part of the proviso in sub-section (6) will apply will depend upon whether there is any such person as is there referred to. There may be or there may not be, as the case may be; and if no vesting order is made at all, the sub-lessee refusing to take one the lease will be determined under sub-section (2) the sub-lease will be determined under sub-section (6) and the lessor will take the property freed from both.

That appears to be the logical consequence of this Act of Parliament. Now it is impossible not to see that this is a startling conclusion at which to arrive. It will affect, and very seriously affect, the whole practice of taking securities by sub-demise the whole object of which was to prevent the mortgagee becoming liable to the rents and covenants and obligations of the original lease. If the decision of the Court below is right, as we think it is, that anomaly will be introduced into the practice of conveyancing in the event of bankruptcy.

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Further there is a question of considerable difficulty, which it is not necessary now to decide, but which I will shortly allude to, and that is this, whether, assuming an order is made vesting this property in the mortgagees they become liable as assignees or whether they become liable in the terms of the section upon the same liabilities and obligations as the bankrupt was subject to under the lease in respect to the property at the date when the bankruptcy petition was filed. That is an extremely important question and one not altogether free from difficulty. On the one side it is obvious that the vesting order alone would impose upon the person taking the property under it all the obligations and all the rights of a mere assignee. This stipulation or provision, that "where the property disclaimed is of a leasehold nature the Court shall not make a vesting order except upon the terms of making such person subject to the same liabilities and obligations," looks as if some additional liability was intended to be imposed upon the person taking the property under that vesting order. But as I have said that point has not been fully discussed, and having drawn attention to it as an extremely important matter—quite as important, perhaps, as any other that arises under this section—there I leave it.

The conclusion at which we have arrived is this, that the decision of the Divisional Court was correct, which means, in other language that we are of opinion that the decision in *In re Cock, Ex parte Shilson* (see *ante*, page 14), is in accordance with this statute as framed, although it is attended with very startling consequences. The result is that this appeal must be dismissed with costs.

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THE MASTER OF THE ROLLS (LORD ESHER) and BOWEN, L.J.,  
 concurred.

*Appeal dismissed with costs.*

*Gregory :*

I am desired respectfully to ask your Lordships for leave to  
 appeal to the House of Lords.

THE MASTER OF THE ROLLS.

Yes : We think it is a proper case.

*Leave to appeal given.*

Solicitors : *Hanbury, Hutton, & Witting*, for C. H. Hanbury.  
*W. T. Bloxam*, for the Clothworkers' Company.

## PRACTICE.

COURT OF  
 APPEAL

BEFORE THE  
 MASTER OF  
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 LINDLEY, L.J.,  
 BOWEN, L.J.  
 1888.

*August 10th.*

IN RE RUSSELL, EX PARTE RUSSELL.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g).*

*Bankruptcy Notice—Judgment by Consent—Omission to file Judge's Order—Right  
 to serve Bankruptcy Notice—Debtors Act, 1869 (32 & 33 Vict. c. 62),  
 section 27.*

*Held:* That although a creditor in whose favour judgment has been  
 signed in pursuance of a judge's order made by consent, omits to file the  
 order in accordance with the provisions of section 27 of the Debtors Act,  
 1869, such creditor is nevertheless entitled to serve the debtor with a bank-  
 ruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act,  
 1883, founded on such judgment.

**T**HIS was an appeal on behalf of the debtor, *C. H. Russell*, from  
 an order of Mr. Registrar Linklater, by which he refused to set  
 aside a bankruptcy notice.

On April 24th, 1888, judgment for the sum of 912*l.* was signed against the debtor in pursuance of a judge's order made by consent.

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The judgment creditor, however, omitted to file this order in accordance with section 27 of the Debtors Act, 1869, which provides that "Where a judge's order, made by consent, is given by a defendant in a personal action whereby the plaintiff is authorised forthwith or at any future time to sign or enter up judgment, or to issue or to take out execution, whether such order is made subject to any defeasance or condition or not, then if the action is in the Court of Queen's Bench the order, and if the action is in any other Court a true copy of the order, shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench within twenty-one days after the making of the order, otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void."

After the twenty-one days within which the order must be filed had elapsed, a bankruptcy notice under section 4, sub-section 1 (*g*) of the Bankruptcy Act, 1883, was issued by the creditor, and application was thereupon made by the judgment debtor to the Registrar to set aside such notice on the ground that the consent order had not been filed.

An order setting aside the bankruptcy notice was at first made, but the attention of the Registrar having been subsequently called to the case of *Gowan v. Wright* (L. R. 18 Q. B. D. 201), he refused to allow such order to be drawn up, and directed the debtor's application to be dismissed.

From that decision the judgment debtor now appealed.

*Digby Seymour, Q.C.* (*R. V. Williams* with him) : for the judgment debtor.

The Registrar in his final decision acted simply on the authority of *Gowan v. Wright* (L. R. 18 Q. B. D. 201 ; 56 L. J. Q. B. 181 ; 35 W. R. 297). In that case it was held "That the effect of non-compliance with the requirements of section 27 is only to render

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such an order and judgment void as against the creditors of such defendant but not as against himself; and therefore that a defendant who had consented to such an order could not get the judgment signed upon it set aside on the ground that the order had not been filed in accordance with the section." The present case is altogether different. When a bankruptcy notice is issued on such a judgment it ought clearly to be set aside in the interest of the creditors, even though the debtor himself could not set aside the judgment. (Counsel also referred to *Bryan v. Child*, L. R. 5 Ex. 868: *In re Smith, Ex parte Brown*, see ante, Vol. III. p. 202; L. R. 17 Q. B. D. 488: *Jones v. Jagger*, 54 L. T. 731.)

*Archibald*: for the judgment creditor was not called upon.

#### THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

In this case there has been a judgment against the debtor obtained by his own consent. He does not meet the judgment. He does not pay and a bankruptcy notice is issued by the judgment creditor. Thereupon the debtor applies to the Bankruptcy Court to set aside the notice on the ground that the consent order on which it has been founded has not been filed. Now it has been held in the case of *Gowan v. Wright* (L. R. 18 Q. B. D. 201) that, as between the judgment creditor and the judgment debtor the non-filing of the order does not make the judgment void, and the inevitable result of that decision is that if the creditor had issued execution the debtor could not effectively have applied to the Court to set aside the judgment. The judgment is effective for all purposes between the judgment creditor and the judgment debtor. Execution issued on such a judgment would clearly be good. There is a valid judgment as between them. Now who is applying here to get rid of the judgment? The debtor. And yet *Gowan v. Wright* says he cannot do that. But it is said that it may be there are other creditors: it may be there are other judgment creditors of the debtor and that it might injure them. But there is no evidence of that at all. There is no evidence of the existence of any other creditors at all. None have come forward. But it is said that what is done will injure these supposititious creditors. How? If there is a bankruptcy it will not be injurious to other

creditors. In a bankruptcy the judgment creditor would gain no priority over them, but he could prove for the debt. Although the judgment would not be effective against them there would be the debt and the creditor will be able to prove for that at any rate. To say that a debtor takes an objection like this on behalf of the creditors is a mere flourish of advocacy. He is simply doing it on his own behalf. No other creditors have appeared and I should say that they do prefer the debtor should be made a bankrupt. It is not injurious to them. The case is directly within the words of the decision in *Gowan v. Wright* (L. R. 18 Q. B. D. 201), and the logical consequence of that decision is that the judgment was good for the purpose of founding a bankruptcy notice upon it. It is only in the case of competition with other creditors that the non-filing of the consent-order is material. There are no circumstances in the present case to take it either out of the words or reasoning of that decision.

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LINDLEY, L.J. :

The construction put upon section 27 of the Debtors Act, 1869, in *Gowan v. Wright* (L. R. 18 Q. B. D. 201), was that notwithstanding the use of the word " void " in the section, the judgment, if the order was not filed, was void only against other creditors and not void as against the debtor himself. It follows, therefore, that unless the judgment can be shown to be prejudicial to other creditors it can be enforced by any means by which judgments can be enforced. It may be enforced by a bankruptcy notice.

BOWEN, L.J. :

I am of the same opinion.

*Appeal dismissed.*

Solicitors: *Dillon Lewis*, for the debtor.

*Tucker & Lake*, for the judgment creditor.

COURT OF  
APPEAL.  
  
BEFORE  
THE MASTER  
OF THE ROLLS,  
FRY, L. J.,  
LOVES, L. J.  
1888.  
October 26th

IN RE SEDGWICK, Ex PARTE SEDGWICK.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g).*

*Bankruptcy Notice—Attachment of Shares by Judgment Creditor during Currency of Notice—Preventing Payment—1 & 2 Vict. c. 110, section 14.*

Where a judgment creditor who had served a bankruptcy notice on the debtor under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, within the seven days allowed for complying with the notice obtained a charging order on certain shares belonging to the debtor.

*Held:* That by so attaching the shares the creditor had not prevented the debtor from paying the judgment debt; and that the debtor was not entitled to have the bankruptcy notice set aside.

In such case the question must be whether the creditor by what he has done has in fact prevented the debtor from complying with the notice, and if all that the creditor has done is to make it more difficult but not to prevent the payment it is not sufficient.

THIS was an appeal on behalf of the debtor *G. S. Sedgwick* from an order of Mr. Registrar Linklater by which he refused to set aside a bankruptcy notice.

Final judgment in an action had been obtained by one *Edward McMurdo* against the debtor and a bankruptcy notice founded thereon was subsequently issued under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, requiring the said debtor within seven days "to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court."

Within the seven days mentioned in the notice, however, the creditor obtained a charging order under the statute 1 & 2 Vict. c. 110, s. 14, upon certain shares belonging to the debtor, and the debtor thereupon applied to the Court to discharge the bankruptcy notice on the ground that the creditor by obtaining such charging order had hindered him in settling the debt.

The Registrar refused to set aside the bankruptcy notice and from that refusal the debtor now appealed.



*E. Cooper Willis, Q.C. (Kisch with him):* for the debtor.

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SEDGWICK.

The question is whether this attachment which was issued by the creditor after the service of the bankruptcy notice but within the seven days mentioned in the notice, is a good reason for up-setting such notice on the ground that the creditor was obstructing the payment of his own debt. In the case of *In re Phillips, Ex parte Phillips* (see *ante*, p. 40), where a creditor issued execution, and an interpleader summons having been taken out, also served a bankruptcy notice on the debtor, Mr. Justice CAVE said "It would in my opinion be very unjust that a creditor could issue a *fi. fa.* and at the same time a bankruptcy notice on failure to comply with the terms of which the debtor commits an act of bankruptcy." The same principle applies to the present case.

[THE MASTER OF THE ROLLS.—In the case you have quoted the decision was given on the ground that the creditor at the time when the bankruptcy notice was issued was not in a position to issue execution. In the present case surely the debtor can sell after the attachment just the same as before?]

At any rate the attachment interferes with the free action of the debtor. He cannot deal with the thing by himself. (The cases of *Ex parte Musgrove, In re Musgrove*, 3 M. D. & D. 386; and *Ex parte Greener, In re Greener*, L. R. 15 Ch. Div. 457; 29 W. R. 268, were also referred to and considered.)

*Vennel:* for the judgment creditor was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER):

As was in effect said in the cases of *Ex parte Musgrove* (3 M. Judgment. D. & D. 386), and *Ex parte Greener* (L. R. 15 Ch. Div. 457), it is obvious that if the words of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, are construed strictly the act of bankruptcy would be complete. But taking the case of *Ex parte Musgrove* as followed and acted upon in *Ex parte Greener* there is an equity laid down—a just equity which goes to the extent only that if a creditor gives a notice requiring payment in seven days and actually and in fact prevents the debtor from paying, such creditor cannot rely upon the notice and it will be set aside. The question is

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whether in the eyes of any person of ordinary fairness in business it will be said that the creditor has in a business sense prevented the debtor from paying. But the possibility that he may have prevented him is not sufficient. The question is whether the creditor has done something which prevents the debtor in fact from complying with the summons. He may do so in different ways. He may put a legal difficulty in the debtor's way, and although he puts no legal difficulty he may have done something which in fact may prevent payment. The question must be whether he has in fact prevented the debtor from complying. The fact that the creditor has made it more difficult for the debtor to pay than if the creditor had done nothing at all does not go to that extent. If all that the creditor has done is to make it more difficult but not to prevent the payment it does not come within the equity. In this case, therefore, the question is whether by attaching these shares the creditor has put such a difficulty in the debtor's way as to prevent him from paying. It is not enough that he may have made it more difficult for him to pay. He must have made it so difficult that as a matter of business he could not pay. Now it cannot be said that the attachment legally prevents the debtor from selling these shares. There is nothing to show that he is in business or law prevented from selling. It seems clear that the owner of goods attached can sell them if when sold he is prepared to satisfy the attachment. Perhaps it does put a difficulty in the way in such a case as this as the company may require the consent of the creditor to the transfer. But if notice is given to the creditor by the debtor that he has sold and can pay him on the transfer, he can oblige the creditor to consent to the transfer. It does not in fact prevent him from selling. It does not in fact prevent him from paying the debt, and the Registrar was therefore right in refusing to set aside the bankruptcy notice.

FRY, L.J. :

I am entirely of the same opinion.

LOPES, L.J. :

I entirely agree.

*Appeal dismissed.*

Solicitors : *Beyfus & Beyfus*, for the debtor.

*R. J. Witty*, for the judgment creditor.

## PRACTICE.

IN RE GOLDRING, EX PARTE HARPER.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g).**Bankruptcy Notice—Person entitled to Issue—Trustee in Bankruptcy of Judgment Creditor.*COURT OF  
APPEAL.BEFORE THE  
MASTER OF  
THE ROLLS,  
FRY, L.J.,  
LOPES, L.J.  
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*Held:* That the trustee in the bankruptcy of a judgment creditor is not a person entitled to issue a bankruptcy notice against the debtor in respect of the judgment debt under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883.

The legal personal representative of the judgment creditor is the only person, other than the judgment creditor himself, who can issue such notice.

THIS was an *ex parte* appeal on behalf of *A. C. Harper* from a decision of Mr. Registrar Linklater by which he refused to allow the issue of a bankruptcy notice.

The case raised an important question whether a trustee in bankruptcy is a person at whose request a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, could be issued.

In 1885 an action on a bill of exchange was brought against the debtor *T. W. Goldring*, by one *Nash* who carried on business as a solicitor under the firm of *Irwin & Nash*, and on April 11th, 1885, judgment was recovered against *Goldring* by *Nash* for 105*l.* 3*s.* 2*d.* and costs.

In September, 1885, a receiving order was made against *Nash* upon which he was adjudicated bankrupt and in February, 1886, Mr. *Harper* was appointed trustee of *Nash's* estate.

In 1887 it was discovered by Mr. *Harper* that the judgment against *Goldring* was not satisfied and on July 26th, 1888, he was desirous of issuing a bankruptcy notice for the judgment debt and costs under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, but the learned Registrar refused to allow the notice to be issued on the ground "that the Court of Appeal had decided in *In re Keeling, Ex parte Blanchett* (see *ante*, Vol. III. p. 157; L. R.

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17 Q. B. D. 908) that the only other person besides the creditor who had obtained the judgment who could issue a bankruptcy notice was the personal representative; and that the trustee was not a personal representative of the bankrupt but of the creditors."

From that decision Mr. *Harper* now appealed.

*F. C. Willis* : for Mr. *Harper*.

In the case of *In re Keeling, Ex parte Blanchett* (see *ante*, Vol. III. p. 157) it was a question of the assignee of a judgment debt. The case of *In re Woodall, Ex parte Woodall* (see *ante*, Vol. I. p. 201; L. R. 13 Q. B. D. 479), shows that a bankruptcy notice may be issued by an executrix, and there is no distinction between an executrix and a trustee in bankruptcy who under section 54 of the Bankruptcy Act, 1883, has the whole estate vested in him. The only mode of getting this debt is by means of a bankruptcy notice.

[THE MASTER OF THE ROLLS : The trustee is really an assignee by operation of law and the case you have cited says that an assignee cannot issue a bankruptcy notice.]

The case is really in my favour because I am on a parallel with an executrix.

THE MASTER OF THE ROLLS (LORD ESHER) :

Judgment.

In this case the question is whether on the request of a trustee in bankruptcy a bankruptcy notice can be issued. The case is decided by *In re Keeling, Ex parte Blanchett* (see *ante*, Vol. III. p. 157). That case decides that the assignee of a judgment cannot issue a bankruptcy notice—that he is a person at whose request a bankruptcy notice cannot be issued. Why? Because he cannot bring his case within the words of the section. It is said that although he cannot bring his case within the words of the section, he can bring it within the spirit of the section by the case of *In re Woodall, Ex parte Woodall* (see *ante*, Vol. I. p. 201). But that case was decided before the case of *In re Keeling, Ex parte Blanchett* (see *ante*, Vol. III. p. 157), and when the case of *In re Keeling, Ex parte Blanchett* was before this Court I consulted with the judges who decided the case of *In re Woodall, Ex parte Woodall*, and in giving my judgment I said, "I think the Court of

Appeal decided that case upon the principle that the personal representative might formerly be made a party to the record, and that the judges meant to go no further. I am of opinion that it would be extremely dangerous to go further, and I have taken the opportunity of speaking to the judges who formed the Court on the occasion when *In re Woodall* was heard. I may say that I have the authority of those other judges to express their opinion also that the section does not go beyond that case." It cannot be said that a trustee in bankruptcy is in the same position as the executrix of the judgment creditor. The position is not the same at all. The judgment in *In re Keeling, Ex parte Blanchett* (see *ante*, Vol. III. p. 157) is general that an assignee of the judgment cannot be brought within the section whether he is an assignee by express contract or assignee by operation of law. The only exception to that is the case of *In re Woodall, Ex parte Woodall* (see *ante*, Vol. I. p. 201). The present case is within the general rule and not within the exception and the case of *In re Keeling, Ex parte Blanchett* is decisive.

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FRY, L.J. :

I am of the same opinion.

LOPES, L.J. :

I am entirely of the same opinion.

*Appeal dismissed.*

Solicitor : *A. T. Smith*, for Mr. Harper.

Cases relied upon or referred to :—

*In re Keeling, Ex parte Blanchett*, see *ante*, Vol. III. p. 157 ;  
L. R. 17 Q. B. D. 303 ; 55 L. J. Q. B. 327 ; 84 W. R. 498.

*In re Woodall, Ex parte Woodall*, see *ante*, Vol. I. p. 201 ; L. R.  
13 Q. B. D. 479 ; 53 L. J. Ch. 966 ; 50 L. T. 747 ; 32 W.  
R. 774.

COURT OF  
APPEAL.BEFORE THE  
MASTER OF  
THE ROLLS,  
FRY, L.J.,  
LOPES, L.J.  
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November 2nd.

## IN RE PENNINGTON, EX PARTE PENNINGTON.

*Antenuptial Settlement—Void as against Creditors—Fraud—13 Eliz. c. 5.*

Where there is evidence of an intent to defeat and delay creditors and to make the celebration of a marriage a part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement.

An antenuptial settlement, therefore, will be set aside under 13 Eliz. c. 5, if the Court comes to the conclusion on the evidence that the marriage was entered into and the settlement executed for the purpose of defeating the creditors of the settlor.

Per LORD ESHER, M.R. :—In the case of a private examination before the Registrar under section 27 of the Bankruptcy Act, 1883, it is the duty of the Registrar to exercise some control over the persons who are conducting such examination, and if the questions put to a witness are such as ought not to be put and are clearly irrelevant or calculated to mislead such witness it is the duty of the Registrar to interpose.

THIS was an appeal on behalf of Mrs. *Elizabeth Pennington*, the wife of the bankrupt from an order of Mr. Justice CAVE by which he directed that an antenuptial settlement dated October 23rd, 1886, and executed by the bankrupt should be set aside on the ground that it was a fraud upon the creditors within the meaning of the Statute of Elizabeth.

The report of the case before Mr. Justice CAVE will be found *ante*, p. 216.

The bankrupt *C. P. Pennington* formerly acted as trustee of certain property in which character he allowed a considerable portion of the trust moneys to get into the hands of Messrs. *Parker & Parker*, the well-known solicitors of Bedford Row, who absconded in 1884. Proceedings in Chancery were consequently instituted against Mr. *Pennington*, and by orders dated December, 1885, and May, 1886, he was directed to replace various sums amounting altogether to about 7,000*l.* with costs.

At this time the only assets which he possessed were the equities of redemption of certain property on mortgage, and on October 23rd, 1886, he executed a settlement covering all the property

which he then possessed and married the present Mrs. *Pennington*, who was then a widow named Mrs. *Wingfield*.

In March, 1887, he was adjudicated bankrupt.

On June 26th, 1888, application was made by the trustee in the bankruptcy to Mr. Justice CAVE that the settlement in question might be set aside (see *ante*, p. 216), and the learned judge being of opinion that the only object of the marriage was under cover of the relationship of husband and wife, to put the property out of the reach of Mr. *Pennington's* creditors, directed the order to be made.

From that order Mrs. *Pennington* now appealed.'

*E. Cooper Willis, Q.C. (Turner with him) : for Mrs. Pennington.*

I say first that there was no intent to defraud here; and secondly, even if there was the wife was not a party to it and she must be so in order to render the settlement void. (Counsel referred to *Campion v. Cotton*, 17 Ves. 263 : *Colombine v. Penhall*, 1 Sm. & Giff. 228 : *Bulmer v. Hunter*, L. R. 8 Eq. 46 ; 38 L. J. Ch. 543 ; 20 L. T. 942 : *Fraser v. Thompson*, 1 Giff. 49.) Mr. Justice CAVE was wrong in saying that the only object of the marriage was to defraud the creditors.

[THE MASTER OF THE ROLLS : At the private examination Mrs. *Pennington* said that she did not care for the marriage. I may here say also that I entirely agree with the remarks made by Mr. Justice CAVE in the course of his judgment in this case in the Court below about questions being put at these examinations which ought not to be put. Sometimes in cases on appeal to us we have question mentioned at No. 2,000 odd. What I want the registrars to do is to do their duty and to stop counsel at once if the question is one which is clearly irrelevant and which ought not to be put ; and if it is clear that the object of the question is to lead the witness to say something which he or she does not intend then to stop it and tell the witness not to answer. If the registrars exercised their powers more strictly in this way these examinations would not be so long as they are, and question 2,000 would never be reached.]

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EX PARTE  
PENNINGTON.

1888. *Sidney Woolf*: for the trustee in bankruptcy was not called  
 upon.  
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 Ex PARTE  
 PENNINGTON.

THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

The law upon this matter is settled. It was laid down by Vice-Chancellor STUART in *Colombine v. Penhall* (1 Sm. & Giff. 228), and by Vice-Chancellor MALINS in *Bulmer v. Hunter* (L. R. 8 Eq. 46). Vice-Chancellor STUART said "Where there is evidence of an intent to defeat and delay creditors and to make the celebration of a marriage a part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement." And Vice-Chancellor MALINS said "The principles are plain. No doubt a man indebted to any extent may on his marriage make a settlement of his property provided the settlement is made honestly and in good faith. But it is clearly established now that marriage cannot be made the means of committing fraud, though it is necessary to show that it was connected with fraud to make a settlement invalid against the wife." And "It is clearly my opinion that a marriage got up for the purpose of defrauding a man's creditors when the intending wife is a party to the fraud will not be supported." Now what is meant by "of defrauding a man's creditors"? It means prevent the distribution amongst them of a person's property who is known to be insolvent. It is not a question whether the marriage can be set aside or whether a person ought to marry a woman with whom he may have previously lived or anything of that kind. It is whether the marriage has been entered into as part of a scheme to deprive the creditors of their rights. Now come to the facts of this case. Mr. Justice CAVE has come to the conclusion that the only object was to put the property out of the reach of Pennington's creditors and that the marriage was only entered into for the purpose of doing that. If that is so and Mrs. Pennington has entered into the marriage for the purpose of defrauding the creditors of their rights the settlement will be set aside although the marriage is good. We must consider the whole circumstances not one or two questions. Now let us take into consideration that in 1883 these persons were willing to marry each other and promised to marry



each other. There is no evidence that at that time anything about a settlement was talked of. If it had been it would not alter the matter. The question is what was the state of things when the settlement was executed. Now they did not marry in 1883, and the woman's account is that they did not marry because she did not care to marry. Then come to 1886. They resume the idea of marriage. Mrs. Pennington does not say that they began to think it wrong to live together and so thought it right to marry. She does not say that she cared more about the marriage in 1886 than she did in 1883. They bring in an attorney and his advice is very pregnant. It is advice as to the effect of the settlement with regard to the husband's creditors, and the wife says in effect "I married him that the settlement might keep the money for himself from his creditors." She married him so that under cover of the relation of husband and wife a marriage settlement might be made and be made to keep the property to himself. If those facts are right the case is brought directly within *Colombine v. Penhall* (1 Sm. & Giff. 228) and *Bulmer v. Hunter* (L. R. 8 Eq. 46). These persons have done that which the bankruptcy law forbids, and the settlement must be set aside.

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FRY, L.J.:

I agree so far with Mr. Willis that the mere fact that the result of the settlement is to delay and defeat creditors will not cause it to be set aside. The question is whether the settlement has been "devised and contrived of malice, fraud, covin, collusion or guile, to the end purpose and intent, to delay, hinder or defraud creditors." It is a question of fact. In the present case I entirely agree with the conclusions of fact which have been arrived at by Mr. Justice CAVE. I think that the marriage settlement was devised for the purpose of delaying the creditors and depriving the creditors of the property for the benefit of the husband himself in his old age.

LOPES, L.J.:

Mr. Justice CAVE has found that the only object of Mr. and Mrs. Pennington was under cover of the marriage to put the property

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out of the reach of the creditors. I agree with that finding and that finding brings the case within the law as laid down.

*Appeal dismissed.*

Solicitors: *S. G. Shearman*, for Mrs. Pennington.

*Stibbard, Gibson & Co.*, for the trustee in bankruptcy.

## PRACTICE.

DIVISIONAL  
 COURT.  
 BEFORE THE  
 LORD  
 CHIEF JUSTICE  
 AND  
 CAVE, J.  
 1888.

*November 6th.*

### IN RE GYLL, EX PARTE THE BOARD OF TRADE.

*Bankruptcy Act, 1883, sections 23 and 35.*

*Annulment of Adjudication—Jurisdiction—Power of Court to Annul Bankruptcy.*

There is no power to annul an adjudication of bankruptcy outside the provisions of the Bankruptcy Act, 1883, upon grounds which may commend themselves for the time being to the Judge to whom the application to annul is made.

The Bankruptcy Act, 1883, is intended to be a complete code upon the subject and in order to annul a bankruptcy the Judge must find in the Act some power enabling him to do so.

Where the discharge of a bankrupt was granted on payment of a dividend of 7s. 6d. in the pound to the creditors and application was subsequently made to the County Court to annul the bankruptcy which was allowed by the County Court Judge on the ground that the said composition of 7s. 6d. in the pound having been paid by the bankrupt's brother with the sole object of putting the bankrupt in as good a position as he was before the bankruptcy such would not be the case unless the bankruptcy was annulled :

*Held* : That even assuming there was a power to annul the adjudication in a case not expressly provided for by the Act of Parliament, under the circumstances of the present case no such order ought to have been made.

THIS was an appeal on behalf of the Board of Trade from an order of the Judge of the Canterbury County Court annulling the adjudication against the bankrupt *Gyll*.

On February 10th, 1886, the debtor was adjudicated bankrupt, and on May 31st he applied to the County Court for his discharge, when an order was made that the discharge should be granted on payment to the trustee in the bankruptcy of his costs and remuneration, together with a sufficient sum to make a dividend of 7s. 6d. in the pound for the creditors.

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These requirements were carried out by the brother of the bankrupt, Major *Gyll*, and an application was then made that the bankruptcy might be annulled.

The County Court Judge after some hesitation made an order annulling the bankruptcy, and from that order the Board of Trade now appealed.

*Muir Mackenzie* : for the Board of Trade.

The short point is that the learned judge had no jurisdiction to make the order he did. The statute prescribes the sole conditions on which a bankruptcy can be annulled, and those conditions have not been fulfilled. Under section 23 of the Bankruptcy Act, 1883, power is given to the creditors to accept a composition or scheme of arrangement after bankruptcy adjudication, and in that case, "if the Court approves the composition or scheme it may make an order annulling the bankruptcy." Also by section 35, sub-section (1), "Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order, annul the adjudication." The facts of this case are that the bankrupt's brother having paid 7s. 6d. in the pound, he is really the person at whose request the order has been made.

*Yate Lee (Probyn with him)* : for the bankrupt.

There is always a power to annul a bankruptcy outside the Act. The brother is willing to pay a certain sum to the creditors if they will do something in return. They accept the offer and relieve the debtor of 12s. 6d. in the pound.

[CAVE, J. : As a matter of fact the debtor wants to keep the benefits of the Act without it being said he has been a bankrupt.]

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It is only doing in a different form that which the Act says may be done. The County Court Judge did not profess to act under the statutory provisions but under the general jurisdiction of the Court. Outside the statutory jurisdiction there is a general jurisdiction to annul in any proper case. Moreover, by section 104, sub-section (1), "Every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction" (Counsel referred to *In re Leslie*, *Ex parte Leslie*, see ante, Vol. IV. p. 75; L. R. 18 Q. B. D. 619; 56 L. T. 569; 35 W. R. 395; *In re Wemyss*, *Ex parte Wemyss*, see ante, Vol. I., p. 157; L. R. 13 Q. B. D. 244; 53 L. J. Q. B. 496; 82 W. R. 1002: *Ex parte Jones*, L. R. 3 Ch. App. 144.)

CAVE, J. :

Judgment.

In this case I have been asked by my Lord to deliver judgment first.

I am of opinion that the appeal in this case must be allowed. For my part I entertain no doubt that the Bankruptcy Act of 1883 is intended to be a complete code upon the subject, and that a judge of a County Court (or of this Court, for that matter), is not at liberty to go and annul an adjudication upon any grounds that may commend themselves for the time being to his judgment, and that the Court under this present Act is bound to have regard not only to the wishes of the creditors, and not only to the wishes of the debtor, but also to the interests of society, and the requirements of commercial morality, and it appears to me, that in order to annul the bankruptcy—that is to say, in order to put an end to the position a man stands in who has been adjudged bankrupt—he must find in the Act some power enabling him to do so.

Now that that is so is, to my mind, borne out by section 85 of the Act, which expresses the circumstances under which an adjudication may be annulled. There is also the other section to which reference has been made, in which an adjudication may be annulled with the consent of the creditors—that is to say, by the creditors consenting to accept the scheme; but there, too, the Act preserves to the Court its power to interfere; and unless the Court is satisfied that it is a proper scheme, and one that ought to be

accepted and acted upon, the consent of the whole of the creditors does not operate to compel the Court to annul the adjudication.

We are left in very considerable doubt with regard to the merits as to this particular case, and it seems to me, even if there were a power to grant an annulment in this case—that this is not a case in which that power ought to be used. I have here before me a newspaper report which is sworn to contain an accurate account of the judgment as delivered. It appears that the debtor became bankrupt some time ago, and, as far as I can make out, he does not seem to have paid anything. Ultimately his brother came forward and undertook to pay the sum of 7*s.* 6*d.* in the pound; and substantially that has been done. The brother has bought up the whole of the debts except one, the debt of one creditor who has never appeared at all, or proved; but all the other debts the brother has bought up, and bought up, I assume, by the payment of this 7*s.* 6*d.* in the pound. That being so, he comes before the Court and says—“Annul the adjudication, and annul it for this reason: When I bought up the debts I thought I could get my brother discharged, and that then he would be received back into the particular club which, owing to his bankruptcy, he has been compelled to quit. I now find that he cannot be received back into the club unless the adjudication is annulled, and I ask you therefore to annul the adjudication.” Now what an outrageous and monstrous proposition that is!

What is the way in which that is dealt with by the learned judge? He says, when he first received notice of the application, he was strongly against him, and were it only a question of the position and conduct of the bankrupt at the present time, he would still be unable to comply with the application—that is to say that, in his judgment, so far as the conduct and position of the bankrupt are concerned, he is not a person whose adjudication ought to be annulled. I should have thought there was an end of the matter. Assuming there was a power—which I have said, I do not think exists—but, assuming there was a power to annul the adjudication, in a case not expressly provided for by an Act of Parliament, I should have thought the statement that there was nothing in the position or conduct of the bankrupt to justify annulling the adjudication, would have been absolutely fatal to the application. It

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appears, however, that the judge went on to say that under the general powers vested in him he might take into consideration the position of the debtor's brother, who had paid the composition of 7s. 6d. in the pound to all the creditors with the sole object of putting his brother in as good a position as he was before the bankruptcy, and if the application was not granted the whole of that expenditure would be thrown away; and upon that ground—absolutely upon that ground—the learned judge annulled the adjudication.

Now just consider what that amounts to. A man may come and say, "I have bought up the whole of the debts of my brother (or my son). I thought at the time that if I did it I should be able to get him put in as good a position as before. I should be able to get him not only discharged but also to have his bankruptcy annulled, and if I cannot have that done I shall have thrown away my money," and the judge says upon that:—"Oh! then of course you shall have it done—the adjudication shall be annulled." Can there be anything conceived which is more outrageous than that? No regard paid at all to the desires of the creditors—who have expressed none—no regard whatever paid to the conduct of the bankrupt, or the causes which led to his bankruptcy—no regard whatever paid to the interests of the public, or the preservation of commercial morality, but because a gentleman says, "I paid this money thinking that if I did I could get a particular result, now, therefore, give me that result or else I shall have wasted my money," thereupon the learned judge seems to have thought that that was a reason for annulling the adjudication. For my part I am clearly of opinion that that is a wholly insufficient ground upon which to do anything of the kind, assuming (which, as I have said, I do not think was the case), he had the power to do it. I think it was wholly insufficient. I also think, under the circumstances of this case, he had no power to do it at all; consequently, on both grounds the decision of the learned County Court judge was wrong.

THE LORD CHIEF JUSTICE (LORD COLERIDGE):

I am of the same opinion. I wished my learned brother to give judgment first because this matter about the jurisdiction of the

Bankruptcy Court is, to a certain extent—I do not say his own jurisdiction, but that jurisdiction which he exercises, and it is particularly his to deal with the principles upon which that jurisdiction should be exercised—therefore I was desirous that he should give judgment first.

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I cannot say how strongly I agree with all he has said, and I confess I am surprised at the reasons given for the action of the learned County Court judge, who could hardly have considered, I think, the thoroughly mischievous consequences which, acting upon such principles, if they were those acted upon, would produce in the administration of the Bankruptcy law.

I do not desire absolutely to commit myself to the proposition, as to whether there was, or whether there was not, under any circumstances, jurisdiction to make this order; but I am clearly of opinion that if there was jurisdiction, it was not well exercised, and that upon both grounds the order of the County Court judge should be reversed.

*Muir Mackenzie :*

My Lords, I do not ask for any costs.

*Appeal dismissed.*

Solicitors : *The Solicitor to the Board of Trade*, for the Board of Trade.

*Hunter & Haynes*, for the bankrupt.

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## PRACTICE.

BEFORE  
MR. JUSTICE  
CAVE.  
1888.

IN RE NICHOLSON, EX PARTE THE BOARD OF TRADE.

*Bankruptcy Act, 1883, section 102, sub-section (5).*

Nov. 12th. *Application to Commit—Defaulting Trustee—Neglect to Comply with Order of Board of Trade to pay moneys into Bankruptcy Estates Account.*

Where a trustee failed to pay into the Bankruptcy Estates Account certain moneys which had come into his hands in respect of the estate of which he was trustee, or to comply with an order of the Board of Trade directing him forthwith to pay over the said moneys, and the Board of Trade applied for an order to commit under section 102, sub-section (5) of the Bankruptcy Act, 1883,

*Held:* That an immediate order of committal must be made; but that such order would lie in the office for a week and not go out if within that time the trustee should pay into the Bankruptcy Estates Account the amount certified to be due from him, together with the costs of the motion.

THIS was a motion by the Board of Trade under section 102, sub-section (5) of the Bankruptcy Act, 1883, for the committal of one *Harker*, as a defaulting trustee, for non-payment into the Bankruptcy Estates Account of certain moneys which had come into his hands in respect of the estate of *Nicholson*, of which he was trustee.

Section 102, sub-section (5) provides that "Where default is made by a trustee, debtor or other person in obeying any order or direction given by the Board of Trade, or by an official receiver or any other officer of the Board of Trade under any power conferred by this Act, the Court may, on the application of the Board of Trade, or an official receiver or other duly authorised person, order such defaulting trustee, debtor or person, to comply with the order or direction so given; and the Court may also, if it shall think fit, upon any such application make an immediate order for the committal of such defaulting trustee, debtor, or other person; provided that the power given by this sub-section shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default."



On June 27th, 1888, Mr. *Harker* had been removed from his office of trustee for failing to render proper accounts, and a motion was made to the Court to compel such accounts to be rendered.

It was also discovered, however, that in May, 1887, he had received from Messrs. *Linklater & Co.* the sum of 75*l.*: and in April, 1888, the sum of 97*l.* 15*s.* from Messrs. *Ingle, Cooper & Holmes*, in respect of the estate of which he was trustee, and on September 13th, 1888, an order was made by the Board of Trade directing him forthwith to pay over these two sums into the Bankruptcy Estates Account.

This order was not complied with, and motion was now made to the Court to commit.

*Muir Mackenzie* : for the Board of Trade.

Under section 102, sub-section (5) the Court has power to make an order of committal, and this is certainly a case for a committal. The trustee has improperly retained these two sums, and to make the matter worse, on December 20th, 1887, he did render an account up to that date, verified by affidavit, by which he showed that only 85*l.* had been received by him in respect of the estate, whereas at that time Messrs. *Linklater & Co.* at any rate had paid him the 75*l.* There is also due from him the sum of 17*l.* 1*s.* 9*d.* interest charged on these amounts under section 74, sub-section (6) of the Bankruptcy Act, 1883, which provides that "If a trustee at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Board of Trade, he shall pay interest on the amount so retained in excess at the rate of twenty pounds per centum per annum, and shall have no claim for remuneration, and may be removed from his office by the Board of Trade, and shall be liable to pay any expenses occasioned by reason of his default."

*F. C. Willis* : for the trustee.

I cannot deny the facts as stated. I have, however, an affidavit by the trustee, in which he says that he has been suffering severely from his throat. He was away in the South of Europe, and only

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found the notices of the Board of Trade on his return. He has now made up his accounts, and the amount found due from him will be paid in a very few days by his surety and a friend.

*Muir Mackenzie :*

The matter is a graver one than a mere audit of account. It is said that the surety will pay the amount, but that is not a consideration which ought to weigh on this motion. The trustee has misappropriated the two sums, at any rate. It is a very grave case, and I ask at least for an order for committal, even if your Lordship allows it to lie for a time in the office.

*F. C. Willis :*

I cannot deny that this is an exceedingly bad case, but I would ask that an order of committal might not be made, as it is now only a question probably of two or three days before the money is paid over. If your Lordship should direct the trustee to pay the costs, it would meet the requirements of the case.

CAVE, J. :

Judgment.

I am of opinion that an immediate order of committal must go. This is a very bad case indeed, and the trustee has been guilty of gross dishonesty. There must be an order of committal, but I direct it to lie in the office for a week, and not to go out if within that time the trustee pays into the Bankruptcy Estates Account the amount which is certified to be due from him, and pays the costs of this motion.

*Order accordingly.*

Solicitors: *The Solicitor to the Board of Trade*, for the Board of Trade.

*G. P. Jones*, for the trustee.

**PRACTICE.****IN RE ROSS, EX PARTE THE TRUSTEE.***Bankruptcy Act, 1883, section 102, sub-section (4).**Transfer of pending Actions to Bankruptcy Judge—Convenience—Delay.*

BEFORE  
MR. JUSTICE  
CAVE.  
1888.  
Nov. 13th.

On application by the trustee under section 102, sub-section (4) of the Bankruptcy Act, 1883, to transfer to the Judge in Bankruptcy three actions pending in the Queen's Bench Division of the High Court, in the first of which the bankrupt was plaintiff, and in the other two the defendant in the first action was suing the bankrupt.

*Held:* That the order to transfer ought not to be made, since no advantage would be derived from such transfer, and the trial of the first action to which alone the trustee had made himself a party, and in which the defendant had been ordered to pay money into Court, would be thereby delayed.

**T**HIS was an application on behalf of the trustee under section 102, sub-section (4) of the Bankruptcy Act, 1883, to transfer three actions pending in the Queen's Bench Division of the High Court to Mr. Justice CAVE as the Judge in Bankruptcy.

Section 102, sub-section (4), provides that "Where a receiving order has been made in the High Court under this Act, the Judge by whom such order was made shall have power, if he sees fit, without any further consent, to order the transfer to such Judge of any action pending in any other division, brought or continued by or against the bankrupt."

The first of the actions sought to be transferred was an action of *Ross v. Godfrey*, in which the bankrupt was the plaintiff and claimed the sum of 395*l.*, due in respect of certain bills of exchange. In 1885 judgment had been signed in this action by default, but no attempt to issue execution was made until 1888, when the defendant *Godfrey* made an affidavit to the effect that no writ had ever been served on him, and the judgment was set aside on payment into Court of 395*l.* The pleadings were completed, and the action was now 80 out of the list.

In the second action *Godfrey* was the plaintiff, and claimed 166*l.* due on a cheque from *Ross*, who set up a counterclaim to the extent

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of 8000*l*. The action was commenced in the present year, and no reply had been delivered.

In the third action which was commenced on April 30th, 1888, *Godfrey* was also the plaintiff, and claimed 299*l*., moneys had and received by *Ross* for the plaintiff's use, and to this a counterclaim was also set up, but the action had not proceeded further.

On May 26th, 1888, a receiving order was made against *Ross*, on which he was adjudicated bankrupt.

The trustee in the bankruptcy now applied that these three actions should be transferred to the Bankruptcy Judge.

*Upjohn* : for the trustee :

I move under section 102, sub-section (4), that these three actions be transferred as the most convenient course. A proof for the two sums of 166*l*. and 299*l*., the subject of the two actions in which *Godfrey* is plaintiff, has been tendered by him in the bankruptcy, but that proof was rejected by the trustee. There was an appeal from the rejection to your Lordship, and when the case came on last week the appeal was ordered to stand over until after the trial of the actions. It seemed to be suggested also that the claims should be transferred, in which case all questions could be settled.

*Herbert Reed* : for Mr. *Godfrey* :

The trustee has no right, at this stage at any rate, to make such an application as this. The trustee was appointed in July last. He gets himself made plaintiff in the first action, and then makes this application. These questions of transfer are questions of convenience, and the trustee must make out some case. The trustee has intervened in the first action, and has made himself plaintiff, and the case is only 30 out of the paper. If the action is transferred it must stand over. The trustee has not come into the other two actions, but he has used them to reject our proof. Mr. *Godfrey* has paid 395*l*. into Court. He thinks he will succeed in the action, and he naturally wants to get the money out as soon as possible. The other two actions are of course practically dropped.

CAVE, J. :

I am of opinion that this motion must be refused. With regard to the first action of *Ross v. Godfrey*, the trustee has made himself a party to the action, and it is set down for hearing. Nothing is to be gained by the transfer. Whether the action is tried by me or by another judge is quite immaterial. On the other hand there will be a delay if the transfer is made, and considering that the defendant has paid 395*l.* into Court, I do not think I ought to make any such order. No good would be got by making it, but delay would be caused which may be avoided. As to the other actions, nothing has been done in them and I apprehend nothing will be done in them. It is useless for *Godfrey* to go on with these actions. The trustee is not a party, and he is quite right in not making himself a party. He does not propose to make himself a party, and I am asked to transfer these actions here when the plaintiff does not want to go on with them. How can I transfer under such circumstances, and what would be the object of a transfer? I cannot make the plaintiff go on with the actions. It seems to me that the course which has been taken by the trustee has been taken in order to prevent the 395*l.* in Court being paid out. The motion must be refused with costs. I will decide as to the personal liability of the trustee for costs when I know the result of the action, and there will be liberty to the trustee to apply for an order to recoup himself out of the estate.

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ROSS,  
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Judgment.

*Application refused.*

Solicitors : *Moon & Gilkes*, for the trustee.

*R. Furber*, for Mr. Godfrey.

**PRACTICE.**

BEFORE  
MR. JUSTICE  
CAVE.  
1888.

IN RE CARTER, EX PARTE CARTER.

*Bankruptcy Rules 1886. Rule 134.*

Nov. 17th.

*Rules of the Supreme Court, 1883, Order LVIII., Rule 16.*

*Application for Stay of Proceedings under Receiving Order—Application to what Court.*

Although an application for a stay of proceedings under a receiving order ought properly to be made to a Divisional Court in Bankruptcy as the Court of Appeal pointed out by Order LVIII., Rule 16 of the Rules of the Supreme Court, 1883, it would seem that where both parties consent an application of this nature will be heard by the Bankruptcy Judge when sitting alone.

**T**HIS was an application on behalf of the debtor, *H. W. Carter*, for a stay of proceedings under a receiving order which had been made against him in the County Court at Rochester.

On November 12th, 1888, a receiving order was made against the debtor in the Rochester County Court, and the registrar then granted a stay of proceedings under the order for one week in order to give an opportunity for an appeal.

Application was now made by the debtor to Mr. Justice CAVE for a further stay pending the appeal.

*E. Cooper Willis, Q.C.*: for the debtor.

*Yate Lee*: for the petitioning creditors.

*Yate Lee*:

I have a preliminary objection. I have certainly no objection that the case on the merits should be heard by your Lordship, but I cannot be taken to agree to your Lordship's jurisdiction. The application is made under Order LVIII., Rule 16, of the Rules of the Supreme Court, 1883, which provides that "An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from,

or any Judge thereof, or the Court of Appeal may order ; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct." That is incorporated in bankruptcy by Rule 134 of the Bankruptcy Rules, 1886.

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CARTER,  
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*E. Cooper Willis, Q.C. :*

I submit that your Lordship has power to hear the case. Order LVIII., Rule 16, lays down only a general provision that an appeal does not operate as a stay. Under the old practice the Chief Judge used to make an order like this. There is no rule to say that your Lordship cannot make the order, and by Rule 353 of the Bankruptcy Rules, 1886, where no new regulations are made, the old practice remains in force.

[CAVE, J. : Under the old practice the stay of proceedings used to be made by the Court of Appeal.]

It will be very hard if the Bankruptcy Divisional Court has to be called together on purpose to hear this application.

[CAVE, J. : Mr. Yate Lee takes the objection, and if he holds to it the only course for me to take will be that I must go out and try to get another Judge to sit with me to hear the application.]

*Yate Lee :*

I do not wish in any way to create unnecessary difficulty. I am perfectly content that your Lordship should hear the case on the merits. What I want to guard against is this. If the decision of your Lordship should be against us we shall most certainly appeal, and I do not want to run the risk of an objection being taken when we get to the Court of Appeal that we cannot appeal because the case has not been heard by a proper tribunal here.

*The case was then proceeded with by consent before Mr. Justice CAVE, it being agreed that the respondents should not be prejudiced in any right of appeal in case the decision should be against them.*

Solicitors : *Stones, Morris & Stone*, for the debtor.

*Roopers & Whately*, for the petitioning creditors.

**PRACTICE.**

BEFORE  
MR. JUSTICE  
CAVE.  
1888.  
Nov. 21st.

IN RE ARNOTT, EX PARTE CHIEF OFFICIAL RECEIVER.

*Bankruptcy Act 1883, section 27.*

*Examination of witness—Privilege of solicitor—Refusal to disclose address of absconding bankrupt.*

Where the address of a person has been concealed and is only known to his solicitor because the client has communicated it to him confidentially, as his solicitor, for the purpose of being advised by him, such address is a matter of professional confidence and the solicitor is not bound to disclose it.

Thus where at a private examination before the Registrar the solicitor of a bankrupt refused to answer a question as to the present address of the bankrupt who had absconded, on the ground that the address had been given to him for the sole purpose of advising the debtor in the bankruptcy proceedings.

*Held:* That the solicitor was within his rights in refusing to answer the question; and that an order compelling him to do so would not be made.

**T**HIS was an application on behalf of the Chief Official Receiver for an order directing a solicitor to disclose the present address of the debtor *Arnott* who had absconded.

The respondent to the motion was one *Elliott*, the managing clerk to Mr. *A. Pulbrook*, the debtor's solicitor, who was now in America.

At a private examination before the Registrar *Elliott* was a witness and was asked to tell the debtor's present address, but he refused to answer the question on the ground that the debtor's address was communicated to him as the debtor's solicitor under a pledge of secrecy.

The receiving order was made against the debtor *Arnott* on August 31st, 1888, upon which he was adjudicated bankrupt, the act of bankruptcy alleged being that on July 31st, 1888, he departed from his dwelling house with intent to defeat and delay his creditors.

The present address of the bankrupt was communicated to his solicitor by letter on October 4th, 1888.



On the report of the Registrar the matter now came before Mr. Justice CAVE for decision.

*Abrahams* : for the Chief Official Receiver.

The only means of obtaining the debtor's address was by examining *Elliott* : He admitted that he knew it but declined to answer on the ground of privilege. My first point is that the information here was not given for the purpose of obtaining advice. In *Ex parte Campbell*, *In re Cathcart* (L. R. 5 Ch. App. 708 ; 23 L. T. 289 ; 18 W. R. 1056) "A witness who was being examined under the Bankruptcy Act, 1861, section 216, was asked where the bankrupt's father was residing. The witness who was the father's solicitor declined to answer and stated that 'the place of residence of my said client came to my knowledge in my professional capacity and in the course and in consequence of the professional employment in which I was engaged on his behalf and in no other way.' It was held that the witness had not made a case for excusing himself from answering on the ground of professional privilege." And Lord Justice JAMES in that case said "What a solicitor is privileged from disclosing is that which is communicated to him *sub sigillo confessionis*—that is to say some fact which the client communicated to the solicitor for the purpose of obtaining the solicitor's professional advice and assistance; the principle being that such communication ought to be privileged, because otherwise a man would be deterred from fully disclosing his case, so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation. But a solicitor's knowledge of his client's residence, even though he knows it simply in consequence of the professional business in which he has been acting for him, is not on that ground alone a matter of confession so as to be in the nature of a privileged or confidential communication." Then further on the Lord Justice said this which I presume will be relied upon by my learned friend—"If indeed the gentleman's residence had been concealed ; if he was in hiding for some reason or other, and the solicitor had said 'I only know my client's residence because he has communicated it to me confidentially, as his solicitor, for the purpose of being advised by me, and he has not communicated it to the rest of the

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world,' then the client's residence would have been a matter of professional confidence."

[CAVE, J.: That is just the case here. The witness in his affidavit says that he had the address for the sole purpose of advising the debtor in these proceedings.]

I submit that the information was not given for the purpose of obtaining advice. Further I say that the address is not the subject of professional privilege at all, and I refer to *Bursill v. Tanner* (L. R. 16 Q. B. D. 1; 55 L. J. Q. B. 53; 53 L. T. 445; 34 W. R. 35). The solicitor can claim no higher privilege than the debtor, and the debtor would be obliged to answer if he were asked this question. The bankrupt here is really in the position of a ward of Court and is setting the Court at defiance. In the face of the two conflicting duties of the solicitor, to the public and to his client, as an officer of the Court he is bound to give the public preference. (Counsel also referred to *Ramsbotham v. Senior*, L. R. 8 Eq. 575; *The Queen v. Cox & Railton*, L. R. 14 Q. B. D. 153; 54 L. J. M. C. 41; 52 L. T. 25; 33 W. R. 396). Moreover in any event I say that in the present case there is no privilege because the parties were engaged in a fraudulent transaction. The act of bankruptcy of the debtor was in departing from his dwelling house on July 31st, and I have an affidavit which shows that the furniture was wrongfully removed by the debtor on that date. On August 1st a charge was given to *Pulbrook* the solicitor, for 900*l.* over the debtor's house. The mortgage obtained by the solicitor was a fraud on the creditors. The debtor and the solicitor were engaged in a joint fraud. The transaction was fraudulent after notice of act of bankruptcy and it can be impeached. When the solicitor is *particeps criminis* the privilege ceases.

[CAVE, J.: Why do you say *particeps criminis*? It is simply if the mortgage is after act of bankruptcy, it can be set aside].

*Sidney Woolf* for the witness: was not called upon.

CAVE, J:

Judgment.

I am of opinion that in this case the witness was entitled to decline to answer the question. It was first argued that the abode

of the client must be disclosed in any event, but there is no authority for that at all. It was then said that the address must be disclosed unless he consults the solicitor as to what his address shall be. It is clear that that is not the basis of the privilege. It is not the basis of the judgment of Lord Justice JAMES where he says "If indeed the gentleman's residence had been concealed; if he was in hiding for some reason or other, and the solicitor had said 'I only know my client's residence because he has communicated it to me confidentially, as his solicitor, for the purpose of being advised by me, and he has not communicated it to the rest of the world,' then the client's residence would have been a matter of professional confidence." Now that exactly describes this case and I feel bound to decide as to that ground therefore that it was professional confidence and the witness was not bound to answer. Then it was said that the bankrupt and the solicitor were engaged in something wrong and the communication was made to the solicitor while so engaged in the offence and consequently that he is bound to disclose the communication. If that could be made out it is good law and in such case the solicitor must not stop short at the address but must tell everything. But what is the offence alleged here? Absolutely none. It is said that the solicitor obtained a mortgage from the client on August 1st and that on July 31st there had been the act of bankruptcy. It is not suggested that the debtor is in hiding because he gave that mortgage and it is obvious that the communication made on October 4th was not with reference to the deed of August 1st. That was completed on August 1st and must stand or fall by that date. It is true that the bankrupt is alleged to have removed his goods, which is an offence against the Bankruptcy laws, and if the letter of October 4th was written for the purpose of taking advice on that subject as to keeping the goods concealed the privilege would be gone and not only the address but the whole communication must be disclosed. But there is no ground for such a suggestion. There is no ground for suggesting that the solicitor was a party to the concealing and removing of the goods or advised the debtor how they might be continued in concealment. Proceedings had been taken against the debtor in bankruptcy and it was natural that he should wish to know how those proceedings were going on and to be

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advised as to those proceedings. There was a perfectly legitimate matter of professional confidence and we ought not where such exists to assume that the solicitor was engaged in doing anything wrong and in attempting to help the debtor to commit an offence. As I have often said it is of the highest importance in my opinion that a man should be able to consult a solicitor without fear. The application therefore fails and must be refused with costs.

*Application refused.*

Solicitors: *M. Abrahams, Son & Co.*, for the Chief Official Receiver.

*A. Pulbrook*, for the witness.

Cases relied on :—

*Ex parte Campbell, In re Cathcart*, L. R. 5 Ch. App. 708 ;  
 28 L. T. 289 ; 18 W. R. 1056.

*Bursill v. Tanner*, L. R. 16 Q. B. D. 1 ; 55 L. J. Q. B. 53 ;  
 53 L. T. 445 ; 84 W. R. 35.

*Ramsbotham v. Senior*, L. R. 8 Eq. 575.

*The Queen v. Con & Railton*, L. R. 14 Q. B. D. 158 ; 54  
 L. J. M. C. 41 ; 52 L. T. 25 ; 33 W. R. 396.

## PRACTICE.

IN RE DIXON &amp; CARDUS, EX PARTE DIXON &amp; CARDUS.

COURT OF  
APPEAL.*Bankruptcy Act, 1883, section 18.**Scheme of Arrangement—Application to Rescind Receiving Order—Assent of  
Creditors—Jurisdiction.*BEFORE THE  
MASTER OF  
THE ROLLS,  
FRY, L.J.,  
LOPES, L.J.  
1888.

Nov. 23rd.

Section 18 of the Bankruptcy Act, 1883, was intended to indicate the general course of practice that after a receiving order has been made a bankruptcy shall go on in the ordinary way unless it is stopped by the effect of a composition or scheme of arrangement under that section; and although an absolute rule has not been laid down that there is no possible scheme of arrangement or composition outside that on the footing of which the Court may not properly discharge the receiving order, yet the Court will not be willing to go beyond the usual course of practice and must be thoroughly satisfied of the necessity of doing so before it can entertain any application for a composition or scheme of arrangement outside section 18.

Where after a receiving order had been made against the debtor on their own petition, a scheme was put forward by them which the creditors were willing to accept, and the debtors thereupon with the assent of the creditors, applied to have the receiving order rescinded on the ground that the proposed scheme of arrangement was not one which could be carried out under the provisions of the Bankruptcy Act:

*Held:* That the application to rescind the receiving order was rightly refused; and that if the debtors were desirous of substituting a scheme their proper course was to proceed in the manner provided under section 18 of the Bankruptcy Act, 1883.

THIS was an appeal from an order of the Divisional Court in Bankruptcy confirming an order of the Registrar of the Southampton County Court by which he refused to rescind a receiving order which had been made against the debtors.

The debtors *Dixon & Cardus* carried on business at Southampton and in March, 1886, they became involved as co-defendants in Chancery proceedings instituted by certain persons who claimed an interest in the debtors' business.

On May 10th, 1887, a receiver was appointed in the Chancery proceedings who took possession of the assets of the business, and it was stated that his commission amounted to something like 4,000*l.* a-year.

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In consequence of the assets of the business being in the hands of the receiver, the debtors were unable to meet their engagements and judgments were recovered against them.

On April 20th, 1888, the debtors filed their own petition upon which a receiving order was made on the same day.

The statement of affairs showed a surplus of 10,000*l.* on the joint estate, but this was in Chancery. A surplus was also shown on the separate estates of the debtors.

A compromise was subsequently attempted and a deed prepared embodying its terms, which were accepted by the creditors, and application was thereupon made by the debtors with the assent of the creditors to the County Court Registrar to rescind the receiving order.

This application was refused by the Registrar and his decision was on November 7th last confirmed by the Divisional Court in Bankruptcy which held that the Registrar was right in refusing to rescind the receiving order under the circumstances and that if the debtors were desirous of substituting a scheme they must proceed in the manner provided by Section 18 of the Bankruptcy Act, 1883.

From this decision the debtors now appealed to the Court of Appeal.

*Yate Lee* : for the debtors.

The Court has power to rescind the receiving order and this is a case in which it ought to exercise that power.

[FRY, L.J. : Why do you not proceed under section 18 ?]

The arrangement is not one which could be carried out under section 18. It is very complicated. If we can get the receiving order rescinded and are allowed to come in under the Chancery Scheme the creditors will get 20*s.* in the pound. If the bankruptcy proceeds the creditors will get nothing. The deed is approved by the creditors. It provides for the winding-up of the estate in Chancery.

[FRY, L.J. : Why cannot the trustee enter into the compromise if the scheme is a proper one ?]

The scheme could not be carried out in bankruptcy. This application is entirely in the interest of the creditors. The plaintiffs in the Chancery action are willing to give up a claim of something like 15,000*l.* if the scheme is carried out.

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[THE MASTER OF THE ROLLS: Why is the Court to allow a scheme to be adopted outside the control of the Court?]

It is absolutely impossible to deal with the assets in a scheme under the Court.

[FRY, L.J.: You will have to get the approval of the Judge in Chancery to your scheme and what guarantee have you that he will grant it? You are asking us to discharge the receiving order, putting up a scheme which will come to no effect unless the Chancery Judge will agree to it.]

*Sir Edward Clark, Q.C.*, Solicitor-General (*Muir Mackenzie* with him): for the Board of Trade were not called upon.

THE MASTER OF THE ROLLS (LORD ESHER):

Acting on the Rules of the Court of Appeal, which I do not mean Judgment to say are absolute rules, but acting on the rules of conduct we have always adopted, it seems to me it is impossible that we can do anything other than dismiss this appeal. Here the case has been before the Divisional Court; it is not denied that they had jurisdiction to allow or refuse the application which was made to them. If that is so, and they had jurisdiction either to allow the application or to refuse it, whether they would allow it or refuse it was a matter of discretion for them. There were reasons and perhaps strong reasons for anything I know to the contrary—although I do not see the strength of them myself, at any rate there were reasons strongly laid before them because about that there can be no doubt—whether they were strong reasons or not is another point—but there were reasons which I will assume for the moment were strong, why they might have exercised their discretion and have done what was asked of them: but it seems to me that there were also very strong reasons why they might decline to do what was asked of

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them and they have exercised their discretion in that way. That seems to me enough to prevent this Court interfering with what they have done. I know that immense stress has been put on this—that a scheme cannot be prepared which could be carried out under the supervision of the Court of Bankruptcy, that is under section 18. I am not at all clear that a scheme substantially like this, or very nearly like this, could not be made. I am certainly not at all clear that a scheme which will be beneficial to the creditors might not be made out which might be adopted and carried out under the supervision of the Court. But if this scheme or anything like it cannot be carried out under the supervision of the Court, then I think there is tremendous force in what has been pointed out by the Lord Chief Justice and Mr. Justice CAVE, that the appellant here is asking the Court to take its hand off, to cancel this Receiving Order on the faith of a scheme which it is said the Court could not deal with if its hand was kept off.

Then if the scheme fails, what then? The bankrupts will be free: the creditors will get nothing and all that can be suggested is that one of the creditors may then begin a new bankruptcy. But is that for the benefit of the creditors at large? It seems to me, certainly not. I cannot help thinking the case is in a dilemma. If a scheme can be made which would keep the hand of the Court on let it be made; if a scheme cannot be made without the Court taking its hand off unless it can be shewn that that scheme will be carried out to perfection the moment the hand of the Court is taken off, I think the scheme ought not to be allowed by the Court; that is to say, the Court ought not to take its hand off under these circumstances, leaving the creditors to the risk of the scheme breaking down. I think the discretion of the Court below was rightly exercised and that all we have to do is to dismiss this appeal. That does not in my opinion prevent the creditors trying their hand again if they should think fit.

FRY, L. J. :

I am of the same opinion. The legislature intended that a bankruptcy was to go on after it commenced in the ordinary way unless it was stopped by the effect of a composition or a scheme of arrangement under section 18. I will not go so far as to say that



there is no scheme of arrangement or composition outside that on the footing of which the Court may not properly discharge the Receiving Order. But I do say this, that that section was intended to indicate the general course and line of practice, and that the Court must be very well satisfied of the necessity of going beyond that line—going outside that course of practice—before it can entertain any application for composition or scheme of arrangement outside section 18. For myself I should pause long before I stayed any proceedings in bankruptcy under the scheme of arrangement which was not capable of being brought within section 18, for it must be borne in mind that that section provides certain fetters upon the proceedings and it requires the exercise of certain discretions and judgments before the proposition or scheme of arrangement is made binding, and the Court must, before approving a composition or scheme, receive the report of the Official Receiver upon the terms of the composition or scheme, and as to the conduct of the debtor, and it must listen to any objection that may be made on behalf of the creditors; and further, the Court must be satisfied before approving it that it is for the interest of the general body of creditors.

Now these conditions are not imposed recklessly by the legislature. They are imposed because in their view it is right that the discretion should be exercised before the composition or scheme of arrangement is made binding on the general body of the creditors. Now it is said and probably rightly said (I express no opinion on that point) that the scheme cannot be brought within the terms of section 18. If so it is a very strong indication that this is not a scheme of the description which the legislature thought ought to be a bar to further proceedings in bankruptcy. I should have been very unwilling to go beyond the scope of section 18 in any arrangement of this description. But I further entirely agree with what has been said by the Master of the Rolls, namely that this scheme has been presented in the first place to the Registrar. It was rejected by him and then it was presented to the Divisional Court and has been rejected by the Lord Chief Justice and Mr. Justice CAVE. The application to rescind the Receiving Order was before the Registrar and that was refused. It was then presented to the Divisional Court with the scheme and was rejected by them. Mr.

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Yate Lee has not satisfied me that as a matter of discretion they have exercised their discretion wrongly. I am especially struck with this, that he asks us now absolutely to rescind the Receiving Order and to leave the question whether the scheme of arrangement ever should be carried into effect to the discretion, as it must be, of the Judge in the Chancery Division, who will exercise that discretion not in the interest of the creditors, but in the interest of other people. For one I decline to over-rule the discretion which has been exercised by the learned judges in the Court below.

LOPES, L. J. :

I entirely agree, and I only wish to allude to one matter. Everything that has been before the Court to-day was before the Divisional Court and the Divisional Court had jurisdiction to deal with the matter. The Divisional Court having heard all that we have heard to-day in the exercise of its discretion came to the conclusion that the Receiving Order should not be annulled. I am of opinion that no case has been made out by Mr. Yate Lee to induce us to interfere in any way with the discretion which the Court below has exercised.

*Appeal dismissed.*

Solicitors: *R. C. W. Dixon*, for the debtors.

*The Solicitor to the Board of Trade*, for the Board of Trade.

## DIGEST OF CASES REPORTED IN THIS VOLUME.

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**ABUSE OF PROCESS.**—Where application was made under Rule 25 of Schedule II. of the Bankruptcy Act 1883, by one creditor in the bankruptcy to reduce or expunge the proof of another creditor, but it was shown that such application although made in the name of the creditor was in reality for the benefit and on behalf of the bankrupt.

*Held*: That it is not permissible to use the process of the Court to do indirectly that which the process of the Court will not allow to be done directly; and that the application must be dismissed. *In re Tallerman, Ex parte Rooney*. p. 119

**ACT OF BANKRUPTCY**—*Departing from dwelling-house.*—The purchase of a debt in order to found a bankruptcy petition upon it does not necessarily constitute under all circumstances an abuse of the process of the Bankruptcy Court.

Where, however, the bankruptcy law is put in force for an illegitimate purpose, and the Court sees that such petition is presented, not with the *bond fide* view of obtaining an adjudication, but for some collateral purpose, or with the view of putting pressure on the debtor, it will refuse to make a receiving order.

But where a debtor committed an act of bankruptcy by departing from his dwelling-house, and the debt of one creditor was purchased by another whose own debt was insufficient to found bankruptcy proceedings, in order to present a petition against such debtor for the *bond fide* purpose of having the debtor's property taken care of and the assets distributed amongst the creditors.

*Held*: That the petition was not an abuse of the process of the Court; and that a receiving order was rightly made. *In re Baker, Ex parte Baker*. p. 5

**Execution of deed of assignment.**—On September 1st, 1887, the debtor executed a deed of assignment for the benefit of all his creditors, to which the respondent to the present appeal was a party, being a creditor and also trustee under the said deed, which contained a clause releasing the debtor from "all debts, claims, and demands whatsoever," which they the said releasing parties had against him up to the date thereof.

On September 23rd, 1887, a bankruptcy petition was presented against the debtor by a creditor who had refused to sign the deed, the act of bankruptcy alleged being its execution, and on October 1st, 1887, a receiving order was made.

The official receiver as trustee disallowed the proofs tendered by the creditors who had signed the deed, amongst others that of the present respondent, on the ground that by executing it they had released their debts, but the proofs were subsequently allowed by the County Court Judge, from whose decision the official receiver appealed.

*Held*: That the question was one of intention: that the intention was that the deed was not to operate in the event of bankruptcy, and the release was to hold good in case the consideration for which it was given should hold good, and not otherwise; and that the creditor was entitled to prove. *In re Stephenson, Ex parte Official Receiver* . . . . . p. 44

ALIMONY.]—(1) An order made in the Divorce Court for the payment to a wife by her husband of alimony *pendente lite* is not a “final judgment” within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon which a bankruptcy notice can be founded on failure of the husband to pay such alimony as directed. *In re Henderson, Ex parte Henderson* . . . . . p. 52

(2) An order for alimony *pendente lite* followed by a further order for permanent alimony having been made in the Divorce Court, and the sum of 130*l.* being due from the husband under these orders, a judgment summons in respect thereof was issued by the wife.

*Held*: That in such case a receiving order in lieu of committal could not be made by the Court under section 103, sub-section (5) of the Bankruptcy Act, 1883, the wife not being strictly a “judgment creditor.”

But that she was entitled to come to the Court under section 5 of the Debtors Act, 1869; and that an order directing payment of the sum due by instalments of 10*l.* a month should be made. *In re Otway, Ex parte Otway* . . . . . p. 115

ANNULMENT OF BANKRUPTCY.]—There is no power to annul an adjudication of bankruptcy outside the provisions of the Bankruptcy Act, 1883, upon grounds which may commend themselves for the time being to the Judge to whom the application to annul is made.

The Bankruptcy Act, 1883, is intended to be a complete code upon the subject, and in order to annul a bankruptcy, the Judge must find in the Act some power enabling him to do so.

Where the discharge of a bankrupt was granted on payment of a dividend of 7*s.* 6*d.* in the pound to the creditors, and application was subsequently made to the County Court to annul the bankruptcy, which was allowed by the County Court Judge on the ground that the said composition of 7*s.* 6*d.* in the pound having been paid by the bankrupt's brother with the sole object of putting the bankrupt in as good a position as he was before the bankruptcy, such would not be the case unless the bankruptcy was annulled.

*Held*: That even assuming there was a power to annul the adjudication in a case not expressly provided for by the Act of Parliament, under the circumstances of the present case no such order ought to have been made. *Re Gyll, Ex parte Board of Trade* . . . . . p. 272

ANTENUPTIAL SETTLEMENT.]—See *Settlement*.

APPEAL—*Costs of*.]—Where the proof of a creditor residing abroad is rejected by the trustee in a bankruptcy, and from such rejection the creditor appeals, the Court has no jurisdiction to order such creditor to give security for the costs of the appeal. *In re Vanderhaage, Ex parte Izard* . . . . . p. 27

*Under Bankruptcy (Discharge and Closure) Act, 1887.*—It would seem that an order made in the County Court under the Bankruptcy (Discharge and Closure) Act, 1887, being an order made in a bankruptcy matter, there is a right of appeal from such order even though no right of appeal is expressly given by the Act itself.

Also that in such case the appeal will lie to the Divisional Court in Bankruptcy. *In re Williams, Ex parte Williams* . . . . . p. 162

*Time of.*—Notice of appeal from an order refusing to set aside a bankruptcy notice should be a fourteen days' notice.

Where such notice was not given, the Court directed the case to stand over to a certain day until the required time had elapsed, and notice to be given to the creditor that the Court had appointed such day for the hearing of the appeal. *In re Phillips, Ex parte Phillips* . . . . . p. 187

ARRANGEMENT.]—See *Scheme of Arrangement*.

ATTACHMENT—*Of shares.*—Where a judgment creditor who had served a bankruptcy notice on the debtor under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, within the seven days allowed for complying with the notice, obtained a charging order on certain shares belonging to the debtor.

*Held:* That by so attaching the shares, the creditor had not prevented the debtor from paying the judgment debt; and that the debtor was not entitled to have the bankruptcy notice set aside.

In such case the question must be, whether the creditor by what he has done has in fact prevented the debtor from complying with the notice; and if all that the creditor has done is to make it more difficult but not to prevent the payment it is not sufficient. *In re Sedgwick, Ex parte Sedgwick* . . . . . p. 262

ATTORNMENT CLAUSE.]—An indenture of mortgage contained a clause whereby the mortgagor attorned and became tenant from quarter to quarter to the mortgagee in respect of the premises at a yearly rent by equal quarterly payments, the first payment to be made on the first day of the month next after any interest thereby secured should have become in arrear, but all money received by the mortgagee for rent due under the attornment to be accepted in the first place in or towards satisfaction of the interest then in arrear: provided that the attornment should not make it compulsory on the mortgagee to collect the rent payable thereunder, and that she should not be accountable to a second mortgagee or any subsequent incumbrancer for any rent that might have been recovered under such attornment: and provided that the mortgagee might at any time after she was by law empowered to sell, enter upon and take possession of the premises and determine the tenancy.

A bankruptcy petition was subsequently presented against the mortgagor, upon which he was adjudicated bankrupt, but between the presentation of such petition and the adjudication the mortgagee distrained under the tenancy created by the attornment and realised the sum of 171*l*.

*Held* (LORD ESHER, M.R., doubtful): That the clause in question fell within section 6 of the Bills of Sale Act, 1878, but did not come within the proviso to

the said section ; and that the trustee in the bankruptcy was entitled to the money realized. *In re Willis, Ex parte Lady Willoughby de Eresby* . p. 189

**BANKRUPTCY NOTICE—Against Married Woman.]**—A married woman who does not carry on a trade separately from her husband is not subject to the bankruptcy laws ; and a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, cannot be served upon her. *In re Gardiner, Ex parte Coulson* . . . . . p. 1

**Right to Issue.]**—(1) On July 8th, 1887, judgment was recovered against the debtor, and execution was issued under which the sheriff levied on July 11th.

On July 13th, a third person having claimed the goods, an interpleader summons was issued by the sheriff.

On the same day—July 13th—a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, was served by the judgment creditor upon the debtor, on which a receiving order was subsequently made against him in the County Court.

**Held :** That at the time when the bankruptcy notice was issued the creditor was not in a position to issue execution ; and that the receiving order must be set aside. *In re Phillips, Ex parte Phillips* . . . . . p. 40

(2) An order made in the Divorce Court for the payment to a wife by her husband of alimony *pendente lite* is not a “final judgment” within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon which a bankruptcy notice can be founded on failure of the husband to pay such alimony as directed. *In re Henderson, Ex parte Henderson* . . . . . p. 52

(3) An action in the Chancery Division of the High Court by which the plaintiff claimed to be entitled to certain estates held by the defendant, having been dismissed for want of prosecution with costs, and such costs not being paid, a bankruptcy notice was issued against the debtor in respect thereof.

**Held :** That the order in question was not a “final judgment” within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon which a bankruptcy notice could be founded.

**Per LORD ESHER, M.R. :** That a “final judgment” in the said sub-section means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour either of the plaintiff or the defendant. *In re Riddell, Ex parte Earl of Strathmore* . . . . . p. 59

(4) Where a garnishee order absolute has been served upon a judgment debtor by a creditor of the judgment creditor attaching the debt due from such debtor, even though the debt in respect of which the garnishee order was obtained is in fact subsequently paid by the judgment creditor, such judgment creditor is not entitled to serve a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon the judgment debtor in respect of his debt, unless the garnishee order has been discharged or until leave has been given to him to issue execution under Rule 23 of Order XLII. of the Rules of the Supreme Court, 1883. *In re Connan, Ex parte Connan* p. 89

(5) Although a creditor in whose favour judgment has been signed in pursuance of a judge's order made by consent, omits to file the order in accordance with section 27 of the Debtors Act, 1869, such creditor is nevertheless entitled to serve the debtor with a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, founded on such judgment. *In re Russell, Ex parte Russell* . . . . . p. 258

(6) Where a judgment creditor who had served a bankruptcy notice on the debtor under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, within the seven days allowed for complying with the notice, obtained a charging order on certain shares belonging to the debtor.

*Held*: That by so attaching the shares the creditor had not prevented the debtor from paying the judgment debt; and that the debtor was not entitled to have the bankruptcy notice set aside.

In such case the question must be whether the creditor by what he has done has in fact prevented the debtor from complying with the notice; and if all that the creditor has done is to make it more difficult but not to prevent the payment it is not sufficient. *In re Sedgwick, Ex parte Sedgwick* . . . . . p. 262

(7) The trustee in the bankruptcy of a judgment creditor is not a person entitled to issue a bankruptcy notice against the debtor in respect of the judgment debt under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883.

The legal personal representative of the judgment creditor is the only person, other than the judgment creditor himself, who can issue such notice. *In re Goldring, Ex parte Harper* . . . . . p. 265

*Appeal from.*—Notice of appeal from an order refusing to set aside a bankruptcy notice should be a fourteen days' notice.

Where such notice was not given, the Court directed the case to stand over to a certain day until the required time had elapsed, and notice to be given to the creditor that the Court had appointed such day for the hearing of the appeal. *In re Phillips, Ex parte Phillips* . . . . . p. 187

**BILL OF SALE.**—(1) Where a bill of sale not made in accordance with the statutory form purported to assign, together with personal chattels, certain trade machinery not personal chattels for the purposes of the Bills of Sale Acts.

*Held*: That the illegal part of the security could be severed from the legal; and that, as regarded the machinery, the security was good.

The case of *Davies v. Rees* (L. R. 17 Q. B. D. 408; 55 L. J. Q. B. 363; 54 L. T. 813; 34 W. R. 573) distinguished. *In re Burdett, Ex parte Byrne* . p. 32

(2) An indenture of mortgage contained a clause whereby the mortgagor attorned and became tenant from quarter to quarter to the mortgagee in respect of the premises at a yearly rent by equal quarterly payments, the first payment to be made on the first day of the month next after any interest thereby secured should have become in arrear, but all money received by the mortgagee for rent due under the attornment to be accepted in the first place in or towards satisfaction of the interest then in arrear: provided that the attornment should not make it compulsory on the mortgagee to collect the rent payable thereunder, and that she should not be accountable to a second mortgagee or any subsequent

incumbrancer for any rent that might have been recovered under such attornment: and provided that the mortgagee might at any time after she was by law empowered to sell, enter upon and take possession of the premises and determine the tenancy.

A bankruptcy petition was subsequently presented against the mortgagor, upon which he was adjudicated bankrupt, but between the presentation of such petition and the adjudication the mortgagee distrained under the tenancy created by the attornment and realised the sum of 1715*l*.

*Held*: (LORD ESHER, M.R., doubtful): That the clause in question fell within section 6 of the Bills of Sale Act, 1878, but did not come within the proviso to the said section; and that the trustee in bankruptcy was entitled to the money realised. *In re Willis, Ex parte Lady Willoughby de Eresby*. . . . p. 189

**BOARD OF TRADE—Objection to Trustee by.**—On October 1st, 1887, a deed of assignment was executed by a debtor for the benefit of his creditors, under which a trustee was appointed who dealt with the estate.

On December 10th, 1887, a petition was presented against the debtor upon which a receiving order was made and the debtor adjudged bankrupt, the act of bankruptcy alleged being the execution of the said deed.

On February 11th, 1888, by a special resolution of the creditors the trustee under the said deed of assignment was appointed trustee in the bankruptcy, but the Board of Trade under section 21, sub-section (2) of the Bankruptcy Act, 1883, objected to this appointment on the ground that the connection of the person so appointed with the bankrupt's estate made it "difficult for him to act with impartiality in the interest of the creditors generally," it being alleged (1) that he had dealt with the estate of the bankrupt with notice of the act of bankruptcy on which adjudication was made: (2) that he was accountable to the trustee in the bankruptcy in respect of such dealings: (3) that he had in his hands moneys forming part of the property of the bankrupt which he had failed to pay over, and that the question in respect thereof could only be ascertained by an investigation instituted by some other independent trustee.

*Held*: That the objection must be sustained: that the person so appointed trustee had put himself into the position in which he would have to decide between his own interests and the claims of the creditors: and that upon the facts brought to the notice of the Court beyond proof that it was difficult for him to exercise strict impartiality there was reason to suspect that he had already failed in doing so. *In re Martin, Ex parte The Board of Trade*. . p. 129

**Objection by, to Joint Petition.**—On February 11th, 1888, a receiving order was made against a husband and wife jointly on their joint petition, but on discovery by the official receiver that the debtors had not traded jointly or in partnership, the joint receiving order was, on February 23rd, 1888, rescinded and separate receiving orders and orders of adjudication were made against each of the debtors individually.

An objection was taken by the Board of Trade to the insertion in the *Gazette* of two receiving orders against two persons not being in partnership and petitioning the Court under one petition; and on March 15th, 1888, an application was made by the official receiver to the Court to rescind the receiving order and



adjudication against the husband, it being shown that he had no assets, and had acted only as manager in the wife's business.

*Held:* (1) That the official receiver, either as official receiver or as trustee, had *locus standi* to apply to the Court to have the receiving order and adjudication against the husband rescinded.

(2) That the Court had power to rescind the receiving order and adjudication; and that it was the duty of the Court under the circumstances to do so, and to amend the petition by striking out the husband's name. *In re Bond & Bond, Ex parte The Official Receiver.* . . . . . p. 146

*Application by, for committal of Trustee.*—Where a trustee failed to pay into the Bankruptcy Estates Account certain moneys which had come into his hands in respect of the estate of which he was trustee or to comply with an order of the Board of Trade directing him forthwith to pay over the said moneys, and the Board of Trade applied for an order to commit under section 102, sub-section (5) of the Bankruptcy Act, 1883.

*Held:* That an immediate order of committal must be made; but that such order would lie in the office for a week and not go out if within that time the trustee should pay into the Bankruptcy Estates Account the amount certified to be due from him, together with the costs of the motion. *In re Nicholson, Ex parte Board of Trade.* . . . . . p. 278

**CERTIFICATE** — *To remove Disqualifications.*—See *Disqualifications of Bankrupt.*

**CHARGING ORDER**—*On Shares.*—See *Attachment.*

**COMMISSION**—*Proof for.*—On January 7th, 1887, an estate agent, in whose hands the debtor had placed certain property for sale, introduced to such debtor a person with a view to purchase, but no agreement could then be come to as to terms; and the debtor a few days afterwards presented his own petition in bankruptcy.

On January 17th, 1887, further negotiations took place between the person so introduced and the trustee in the bankruptcy in respect of the property, and on January 24th, 1887, the purchase was completed, but a proof subsequently tendered by the estate agent for his commission was rejected by such trustee.

*Held:* That the sale was brought about in consequence of the introduction, and was traceable thereto; and that the proof for commission must be allowed. *In re Beale, Ex parte Durrant.* . . . . . p. 37

**COMMITTAL**—*Of Trustee.*—Where a trustee failed to pay into the Bankruptcy Estates Account certain moneys which had come into his hands in respect of the estate of which he was trustee, or to comply with an order of the Board of Trade directing him forthwith to pay over the said moneys, and the Board of Trade applied for an order to commit under section 102, sub-section (5) of the Bankruptcy Act, 1883.

*Held:* That an immediate order of committal must be made; but that such

order would lie in the office for a week and not go out if within that time the trustee should pay into the Bankruptcy Estates Account the amount certified to be due from him, together with the costs of the motion. *In re Nicholson, Ex parte Board of Trade* . . . . . p. 278

COMPANY—*Petition by.*—Where a bankruptcy petition presented by a company under section 148 of the Bankruptcy Act, 1883, was not accompanied by the affidavit required by Rule 258 of the Bankruptcy Rules, 1886, stating that the person presenting the petition was the authorised public officer or agent of such company.

*Held:* That the petition was rightly refused. *In re Cripps, Ross & Co., Ex parte Ross* . . . . . p. 226

*Charging Order on Shares in.*—See *Attachment*.

COMPOSITION.]—See *Scheme of Arrangement*.

COSTS—*Of Appeal.*—Where the proof of a creditor residing abroad is rejected by the trustee in a bankruptcy, and from such rejection the creditor appeals, the Court has no jurisdiction to order such creditor to give security for the costs of the appeal. *In re Vanderhaage, Ex parte Izard* . . . . . p. 27

*Of abortive Execution.*—The costs of issuing an abortive execution cannot be added to a judgment debt so as to make up the amount necessary to enable a creditor to present a bankruptcy petition against the debtor under section 6 of the Bankruptcy Act, 1883. *In re Long & Co., Ex parte Long & Co.* . . . p. 29

*Of Solicitor.*—(1) On April 6th, 1887, an order was made directing the receiver appointed in a partnership action in the Chancery Division which had been transferred to the Bankruptcy Court, to pay over the balance of moneys in his hands to the solicitor in the action in respect of his taxed costs.

On January 11th, 1888, the Court on an application by the receiver for directions in view of a claim made by the landlord of premises occupied by the bankrupts for rent, varied its order of April 6th to the extent that the amount due to the landlord should be paid to him, and the remainder to the solicitor.

The moneys in the receiver's hands were not sufficient to pay the solicitor in full, and a claim to priority over the landlord was made by him.

*Held:* (1.) That the order of April 6th, 1887, being made by the Judge sitting as a Judge of the High Court and not in Bankruptcy, that order could not be reheard by him and varied.

(2.) That under section 28 of the Solicitors' Act, 1860, the solicitor's charge was entitled to priority over everything except the claim of a *bond fide* purchaser for value without notice; and that as the landlord did not fill that character, the solicitor was entitled to priority over him. *In re Suffield & Watt, Ex parte Wiggins* . . . . . p. 83

(2) The official receiver as trustee in the bankruptcy entered into a contract for the sale of certain property of the bankrupt which was subject to a mortgage. Such sale was duly completed, the mortgagee executing a reconveyance and his debt being paid out of the purchase money.

On taxation a percentage on the whole amount received for the said property was allowed by the County Court Registrar to the solicitors who acted for the official receiver in carrying out the sale.

*Held*: That the percentage so allowed was right: that the meaning of the proviso in Rule 2 of Section VII. Part II. of the Appendix to the Bankruptcy Rules, 1886, is, that the percentage is not to be paid twice over: and that as in the present case no part of the proceeds of sale were chargeable with a percentage by the mortgagee's solicitors, the vendor's solicitors were entitled to the whole percentage.

*Quære*: Whether any circumstances can arise under which the mortgagee's solicitors would be entitled to a percentage. *In re Gallard, Ex parte Harris* . . . . . p. 123

(3) Although under section 57, sub-section (3) of the Bankruptcy Act, 1883, a trustee may with the permission of the committee of inspection employ a solicitor to do "any business which may be sanctioned by the committee," where a solicitor so employed only does administrative work he is not entitled to charge solicitor's charges in respect thereof, but only such charges as are fair and reasonable having regard to the work so done. *In re Pryor, Ex parte the Board of Trade* . . . . . p. 232

(4) *In small bankruptcy.*—Rule 112 of the Bankruptcy Rules, 1886, which provides that where the estimated assets of a debtor do not exceed the sum of 300*l.* a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, applies to costs which, by the provisions of the Act, are payable out of the estate.

But the rule does not apply to costs which are in the discretion of the Court, and which in consequence of the Court exercising its discretion in one particular way may come to be paid out of the estate.

The rule, therefore, does not apply to proceedings against third parties outside the bankruptcy. *In re Dowson, Ex parte Jaynes* . . . . . p. 240

*Of Creditor.*—A proof in respect of money lent tendered against the estate by the father of the bankrupt was rejected by the trustee on the ground that no notice of the alleged debt appeared in the bankrupt's books of account, and that in any event it was barred by the Statute of Limitations.

*Held*: That by reason of a letter written by the bankrupt to his father four years previous to the bankruptcy, in which the debt was acknowledged, the Statute of Limitations did not apply; and that upon the evidence before it, the Court would not be justified in saying that the claim of the father was not a *bona fide* one.

But that the Court could not be insensible to the fact that the difficulty which had arisen was in great measure due to the conduct of the creditor himself in allowing his debt to remain without formal acknowledgment or entry in the books, by reason of which the trustee had been compelled to come to the Court in the course of his duty; and that although an order would be made allowing the proof, such order must be without costs, the trustee to take his costs out of the estate. *In re Des Vignes, Ex parte Des Vignes* . . . . . p. 143

COUNTY COURT.]—See also *Jurisdiction*.

*Transfer of Proceedings to.*]—An application for the transfer of bankruptcy proceedings from the London Court of Bankruptcy to the County Court is an application which should be made to the Bankruptcy Judge at Chambers. *In re Williams, Ex parte the Chief Official Receiver* . . . . . p. 103

*Jurisdiction of.*]—Although under section 102 of the Bankruptcy Act, 1883, which defines the general power of Bankruptcy Courts, jurisdiction may be given to a County Court Judge to hear a case brought before him, where the amount at stake is large or a question of character is involved it is the duty of such County Court Judge to decline to exercise his jurisdiction unless special circumstances are shown which will justify him in exercising it.

Thus where in May, 1885, certain transactions were entered into by a tenant under a lease, and his landlord, who was also mortgagee of the leasehold, with a view of assisting the tenant who was at that time considerably in debt, but in March, 1887, the tenant became bankrupt, and a motion was subsequently made to the County Court by the trustee in the bankruptcy for an order declaring the said transactions fraudulent and void as against him.

*Held:* That even assuming the County Court had jurisdiction, yet such jurisdiction ought not to be exercised since no special circumstances were shown, while a question of character was involved and a large sum was at stake. *In re Beswick, Ex parte Hazlehurst* . . . . . p. 105

DEBTORS ACT, 1869—*Section 5.*]—An order for alimony *pendente lite* followed by a further order for permanent alimony having been made in the Divorce Court, and the sum of 130*l.* being due from the husband under these orders, a judgment summons in respect thereof was issued by the wife.

*Held:* That in such case a receiving order in lieu of committal could not be made by the Court under section 103, sub-section (5) of the Bankruptcy Act, 1883, the wife not being strictly a "judgment creditor."

But that she was entitled to come to the Court under section 5 of the Debtors Act, 1869; and that an order directing payment of the sum due by instalments of 10*l.* a month should be made. *In re Otway, Ex parte Otway* . . . . . p. 115

*Section 27.*]—Although a creditor in whose favour judgment has been signed in pursuance of a judge's order made by consent, omits to file the order in accordance with section 27 of the Debtors Act, 1869, such creditor is nevertheless entitled to serve the debtor with a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, founded on such judgment. *In re Russell, Ex parte Russell* . . . . . p. 258

*Prosecution for Offences under.*]—Where the bankruptcy petition has been presented by the bankrupt himself, the Court has no power to order the prosecution of such bankrupt for offences alleged to have been committed by him under section 11, sub-sections 13, 14, and 15 of the Debtors Act, 1869, within four months next before the presentation of such petition.

The said sub-sections only make the acts therein specified criminal offences if done by the debtor "within four months next before the presentation of a bank-

ruptcy petition against him ; " and they are not extended by section 163, sub-section (1) of the Bankruptcy Act, 1883, by which only the words " if after the presentation of a bankruptcy petition by or against him " are substituted for the words " if after the presentation of a bankruptcy petition against him." *In re Burden, Ex parte Wood* . . . . . p. 166

DISCHARGE—*Conditional.*—(1) On application by a bankrupt for his discharge the official receiver reported that such bankrupt had brought himself within the provisions of section 28, sub-section (3) of the Bankruptcy Act, 1883, in that he had been guilty of rash and hazardous speculations, by reason of certain gambling transactions in connection with the Stock Exchange.

The County Court Judge refused to grant any order of discharge whatever.

*Held* (on appeal) : That under the circumstances, and taking into consideration the facts that the bankrupt was not a trader and that only one of the offences specified in section 28, sub-section (3) had been reported against him, the proper order would be to suspend the order of discharge for a period of three years. *In re Rankin, Ex parte Rankin* . . . . . p. 23

(2) It would seem that the Court ought not as the condition upon which it grants a bankrupt his discharge, to require such bankrupt to consent to judgment being entered against him for the balance of the provable debts under section 28, sub-section (6) of the Bankruptcy Act, 1883, unless there is a probability that something is likely to be gained by it by reason of the fact of such bankrupt becoming possessed of some after-acquired property. *In re Bullen, Ex parte Arnaud* . . . . . p. 243

DISCHARGE AND CLOSURE ACT, 1887—*Right of Appeal under.*—It would seem that an order made in the County Court under the Bankruptcy (Discharge and Closure) Act, 1887, being an order made in a bankruptcy matter, there is a right of appeal from such order even though no right of appeal is expressly given by the Act itself.

Also that in such case the appeal will lie to the Divisional Court in Bankruptcy. *In re Williams, Ex parte Williams* . . . . . p. 162

DISCLAIMER—*Of Lease.*—(1) Leave having been given to the trustee in a bankruptcy to disclaim the bankrupt's interest in certain leases, it was at the same time ordered, on the application of the landlord, that unless the executor of a mortgagee by subdemise of the bankrupt's interest should, within seven days, elect to accept an order vesting in him the disclaimed property, subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property.

*Held* : That the Court had power to make the order on the application of the landlord ; and that, subject to a formal amendment making it clear that a vesting order might be taken as to all or none or any one or two of the leases, the order made was right.

The case of *In re Parker & Parker, Ex parte Turquand* (see *ante*, Vol. I.

p. 275 ; L. R. 14 Q. B. D. 405 ; 51 L. T. 667 ; 33 W. R. 752) commented on. *In re Cock, Ex parte Shilson* . . . . . p. 14

(2) Where a trustee in bankruptcy disclaims leasehold property of the bankrupt which the bankrupt has mortgaged by subdemise, the Court has power under section 55 of the Bankruptcy Act, 1883, to make an order on the application of the original lessor excluding the sub-lessee from all interest in and security upon the property unless he elects to take a vesting order vesting the property in him subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of such property at the date of the filing of the bankruptcy petition.

*Quere* : Whether if such a vesting order is made the sub-lessee will become liable as if he were an assignee, or whether he will become liable under the original lease as if he had been the original lessee.

The case of *In re Cock, Ex parte Shilson* (see ante), approved and followed. *In re Finley, Ex parte Hanbury* . . . . . p. 248

*Of Property held of the Crown.*—The provisions of section 55 of the Bankruptcy Act, 1883, which give to a trustee in bankruptcy the right to disclaim onerous property, are binding upon the Crown ; and a trustee is entitled under that section to disclaim a bankrupt's interest in property held by him from the Crown. *In re Thomas, Ex parte Commissioners of Woods and Forests* . . p. 209

*Joinder of Respondents in.*—On an application to disclaim against one landlord, any number of mortgagees or sub-lessees who are interested in parts only of the property sought to be disclaimed may be joined ; but different landlords of separate and distinct estates cannot be joined as respondents to one application for leave to disclaim the aggregate property. *In re Whitaker, Ex parte the Trustee* . . . . . p. 178

**DISCOVERY.**—See also *Examination*.

*Of Debtor's Property.*—The property of the bankrupt consisting of a certain mill was sold by the trustee to the bankrupt's brother for the sum of 1,100*l.*, being sufficient to pay all the creditors whose names were set out in the statement of affairs, and of whom notice had been received, their debts in full.

After the assets had been distributed the fact of the bankruptcy was ascertained by a creditor for 396*l.*, whose name the bankrupt had failed to insert in his statement, and it being admitted that a better price might probably have been obtained for the property sold than that actually realised, application was made to the Court by such creditor under section 27 of the Bankruptcy Act, 1883, for an order for the examination of the trustee, the bankrupt, and his brother in respect of the sale proceedings.

*Held* : That the creditor was entitled to make such application ; and that an order ought to be made by the Court directing the examination of the bankrupt and his brother.

But that in the absence of any evidence of *mala fides* or collusion there was nothing to justify the Court in making an order against the trustee.

Where application is made under section 27 of the Bankruptcy Act, 1883, for the examination of a trustee in bankruptcy, it would seem that notice of such

application should be served on the trustee. *In re Whicher, Ex parte Stevens* . . . . . p. 173

**DISQUALIFICATIONS OF BANKRUPT.]**—Although section 32 of the Bankruptcy Act, 1883—by which on being adjudged bankrupt a debtor is disqualified from holding any office of public trust therein specified—is to be construed strictly, yet there is no right to construe the words of the said section otherwise than in their ordinary meaning; and where the bankruptcy is not the result solely of some accident over which or over the direct conducting causes of which the bankrupt has no control it cannot be said to be caused “by misfortune” within the meaning of sub-section 2 (b) of the said section.

Thus where a debtor attributed his bankruptcy to the fact that he had commenced a suit in the Divorce Court against his wife for a divorce on the ground of her adultery, and his petition was dismissed, in consequence of which he was ordered to pay the costs of the wife and of four co-respondents.

*Held:* That the commencement and prosecution of the divorce proceedings were entirely under the control of the bankrupt: that it could not therefore be said that the bankruptcy had been caused “by misfortune:” and that the Registrar was right in refusing to grant to the bankrupt a certificate for the removal of disqualifications under the section. *In re Colin Campbell, Ex parte Colin Campbell* . . . . . p. 94

**DWELLING-HOUSE, DEPARTING FROM.]**—See *Act of Bankruptcy*.

**EXAMINATION—of Witness.]**—Where on examination before the Registrar under section 27 of the Bankruptcy Act, 1883, a witness objects to answer questions put to him, such witness cannot be made a respondent to an appeal against the decision of the Registrar refusing to order the witness to answer the said questions.

Although the answer of a witness summoned for examination under section 27 of the Bankruptcy Act, 1883, must in the end be accepted in so far that witnesses cannot be called to contradict him; yet the Court is not bound at once to accept the first answer as conclusive, but the witness may be further questioned in order to test his credibility.

The case of *Ex parte Rooke, In re Purvis* (56 L. T. 579) explained. *In re Scharrer, Ex parte Tilly* . . . . . p. 79

**Of Trustee.]**—The property of the bankrupt consisting of a certain mill was sold by the trustee to the bankrupt's brother for the sum of 1,100*l.*, being sufficient to pay all the creditors whose names were set out in the statement of affairs, and of whom notice had been received, their debts in full.

After the assets had been distributed the fact of the bankruptcy was ascertained by a creditor for 396*l.*, whose name the bankrupt had failed to insert in his statement, and it being admitted that a better price might probably have been obtained for the property sold than that actually realised, application was made to the Court by such creditor under section 27 of the Bankruptcy Act, 1883, for an order for the examination of the trustee, the bankrupt, and his brother in respect of the sale proceedings.

*Held*: That the creditor was entitled to make such application; and that an order ought to be made by the Court directing the examination of the bankrupt and his brother.

But that in the absence of any evidence of *mala fides* or collusion there was nothing to justify the Court in making an order against the trustee.

Where application is made under section 27 of the Bankruptcy Act, 1883, for the examination of a trustee in bankruptcy, it would seem that notice of such application should be served on the trustee. *In re Whicher, Ex parte Stevens* . . . . . p. 173

*Of Solicitor.*—Where the address of a person has been concealed and is only known to his solicitor, because the client has communicated it to him confidentially, as his solicitor, for the purpose of being advised by him, such address is a matter of professional confidence and the solicitor is not bound to disclose it.

Thus where at a private examination before the Registrar the solicitor of a bankruptcy refused to answer a question as to the present address of the bankrupt who had absconded, on the ground that the address had been given to him for the sole purpose of advising the debtor in the bankruptcy proceedings.

*Held*: That the solicitor was within his rights in refusing to answer the question and would not be compelled to do so. *In re Arnott, Ex parte Chief Official Receiver* . . . . . p. 286

**EXECUTION—Costs of.**—The costs of issuing an abortive execution cannot be added to a judgment debt so as to make up the amount necessary to enable a creditor to present a bankruptcy petition against the debtor under section 6 of the Bankruptcy Act, 1883. *In re Long & Co., Ex parte Long & Co.* . . p. 29

*Stay of.*—(1) On July 8th, 1887, judgment was recovered against the debtor, and execution was issued under which the sheriff levied on July 11th.

On July 13th, a third person having claimed the goods, an interpleader summons was issued by the sheriff.

On the same day—July 13th—a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, was served by the judgment creditor upon the debtor, on which a receiving order was subsequently made against him in the County Court.

*Held*: That at the time when the bankruptcy notice was issued the creditor was not in a position to issue execution; and that the receiving order must be set aside. *In re Phillips, Ex parte Phillips* . . . . . p. 40

(2) Where a garnishee order absolute has been served upon a judgment debtor by a creditor of the judgment creditor attaching the debt due from such debtor, even though the debt in respect of which the garnishee order was obtained is in fact subsequently paid by the judgment creditor, such judgment creditor is not entitled to serve a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon the judgment debtor in respect of his debt, unless the garnishee order has been discharged or until leave has been given to him to issue execution under Rule 23 of Order XLII. of the Rules of the Supreme Court, 1883. *In re Connan, Ex parte Connan* . . . . . p. 89



*Retention of Proceeds of, by Sheriff.*—Section 46, sub-section (2) of the Bankruptcy Act, 1883, provides that where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, “and retain the balance for fourteen days, and if within that time” notice of a bankruptcy petition is served on him and the debtor is adjudged bankrupt, the sheriff shall pay the balance to the trustee in the bankruptcy who shall be entitled to retain the same as against the execution creditor.

*Held:* That the fourteen days within which the prescribed notice must be given commence to run from the date of the sale, and not from the date when the last payment on account of the purchase-money was received by the sheriff. *In re Cripps, Ross & Co., Ex parte Ross* . . . . . p. 226

FEES.]—See *Official Receiver*.

“FINAL JUDGMENT.”—(1) An order made in the Divorce Court for the payment to a wife by her husband of alimony *pendente lite*, is not a “final judgment” within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon which a bankruptcy notice can be founded on failure of the husband to pay such alimony as directed. *In re Henderson, Ex parte Henderson* . . p. 52

(2) An action in the Chancery Division of the High Court by which the plaintiff claimed to be entitled to certain estates held by the defendant, having been dismissed for want of prosecution with costs, and such costs not being paid, a bankruptcy notice was issued against the debtor in respect thereof.

*Held:* That the order in question was not a “final judgment” within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon which a bankruptcy notice could be founded.

*Per LORD ESHER, M.R.:* That a “final judgment” in the said sub-section means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour either of the plaintiff or the defendant. *In re Riddell, Ex parte Earl of Strathmore* . . . . . p. 59

FRAUDULENT PREFERENCE.]—(1) Where upon the evidence it was found that the motive of the bankrupt in making a payment to a creditor of his debt, was not to prefer such creditor but to prevent another person who had become surety for the debtor from being compelled to pay the debt.

*Held:* That as the payment in question was made not with the intention of preferring the creditor to whom it was made, but with the intention of benefiting another person who was not a creditor, such payment was not within section 48 of the Bankruptcy Act, 1883, and could not be set aside as a fraudulent preference. *In re Mills, Ex parte the Official Receiver* . . . . . p. 55

(2) Where a creditor having knowledge of an act of bankruptcy refused to accept money from his debtor, but subsequently executed an assignment of the debt to a friend of the debtor who was stated to be willing to purchase the debt at its full value, and it appeared that such alleged purchaser was altogether ignorant of the matter, the money paid to the creditor being in reality borrowed by the debtor himself for that purpose a few days prior to a receiving order being made against him.

*Held* : That the trustee in the bankruptcy was entitled to the money so paid; and that the creditor must repay it to him forthwith. *In re Roberts, Ex parte Daniel* . . . . . p. 213

**GARNISHEE ORDER.**—Where a garnishee order absolute has been served upon a judgment debtor by a creditor of the judgment creditor attaching the debt due from such debtor, even though the debt in respect of which the garnishee order was obtained is in fact subsequently paid by the judgment creditor, such judgment creditor is not entitled to serve a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, upon the judgment debtor in respect of his debt, unless the garnishee order has been discharged, or until leave has been given to him to issue execution under Rule 23 of Order XLII. of the Rules of the Supreme Court, 1883. *In re Connan, Ex parte Connan* . . . . . p. 89

**INTERPLEADER SUMMONS.**—See *Execution*.

**JUDGMENT SUMMONS.**—See *Debtors Act, 1869*.

**JURISDICTION—Of County Court.**—Although under section 102 of the Bankruptcy Act, 1883, which defines the general power of Bankruptcy Courts, jurisdiction may be given to a County Court Judge to hear a case brought before him, where the amount at stake is large, or a question of character is involved, it is the duty of such County Court Judge to decline to exercise his jurisdiction unless special circumstances are shown which will justify him in exercising it.

Thus where in May, 1885, certain transactions were entered into by a tenant under a lease, and his landlord, who was also mortgagee of the leasehold, with a view of assisting the tenant who was at that time considerably in debt, but in March, 1887, the tenant became bankrupt, and a motion was subsequently made to the County Court by the trustee in the bankruptcy for an order declaring the said transactions fraudulent and void as against him.

*Held* : That even assuming the County Court had jurisdiction, yet such jurisdiction ought not to be exercised since no special circumstances were shown, while a question of character was involved, and a large sum was at stake. *In re Bewick, Ex parte Hazlehurst* . . . . . p. 105

**Of County Court Judge.**—The meaning of section 104, sub-section (1) of the Bankruptcy Act, 1883, is that where a Court having bankruptcy jurisdiction makes an order in bankruptcy, the same Court may review, rescind, or vary such order; but no right is given to a County Court Judge to review, rescind, or vary an order in bankruptcy which has been made by the registrar of such County Court.

On September 17th, 1887, a bankruptcy petition was presented against the debtor, the act of bankruptcy alleged being the execution on July 7th, 1887, of a deed of assignment for the benefit of his creditors generally, but on October 11th, 1887, this petition was dismissed by the County Court registrar, on the ground that the petitioning creditors, by assenting to the said deed, had precluded themselves from relying upon it as an act of bankruptcy.

On January 7th, 1888, an order was made by the County Court Judge rescinding the registrar's order by which he dismissed the petition, and substituting other creditors who had not assented to the deed as petitioning creditors under section 107 of the Bankruptcy Act, 1883.

*Held:* (1) That the County Court Judge had no power to review or rescind the order made by the registrar.

(2) That under the circumstances the order made by the County Court Judge substituting other creditors as petitioning creditors was not warranted by any section of the Bankruptcy Act.

(3) That even if jurisdiction had been given to the County Court Judge to make the order he did, he ought not, on the facts of the case, to have made such order. *In re Maughan, Ex parte Maughan* . . . . . p. 152

*To annul adjudication.*—There is no power to annul an adjudication of bankruptcy outside the provisions of the Bankruptcy Act, 1883, upon grounds which may commend themselves for the time being to the Judge, to whom the application to annul is made.

The Bankruptcy Act, 1883, is intended to be a complete code upon the subject, and in order to annul a bankruptcy, the Judge must find in the Act some power enabling him to do so.

Where the discharge of a bankruptcy was granted on payment of a dividend of 7s. 6d. in the pound to the creditors, and application was subsequently made to the County Court to annul the bankruptcy, which was allowed by the County Court Judge, on the ground that the said composition of 7s. 6d. in the pound having been paid by the bankrupt's brother with the sole object of putting the bankrupt in as good a position as he was before the bankruptcy, such would not be the case unless the bankruptcy was annulled.

*Held:* That even assuming there was a power to annul the adjudication in a case not expressly provided for by the Act of Parliament, under the circumstances of the present case, no such order ought to have been made. *In re Gyll, Ex parte Board of Trade* . . . . . p. 272

*To approve scheme outside Act.*—Section 18 of the Bankruptcy Act, 1883, was intended to indicate the general course of practice, that after a receiving order has been made, a bankruptcy shall go on in the ordinary way unless it is stopped by the effect of a composition or scheme of arrangement under that section, and although an absolute rule has not been laid down that there is no possible scheme of arrangement or composition outside that on the footing of which the Court may not properly discharge the receiving order, yet the Court will not be willing to go beyond the usual course of practice, and must be thoroughly satisfied of the necessity of doing so before it can entertain any application for a composition or scheme of arrangement outside section 18.

Where after a receiving order had been made against the debtors on their own petition, a scheme was put forward by them which the creditors were willing to accept, and the debtors thereupon, with the assent of the creditors, applied to have the receiving order rescinded on the ground that the proposed scheme of arrangement was not one which could be carried out under the provisions of the Bankruptcy Act.

*Held*: That the application to rescind the receiving order was rightly refused; and that if the debtors were desirous of substituting a scheme, their proper course was to proceed in the manner provided under section 18 of the Bankruptcy Act, 1883. *In re Dixon & Cardus, Ex parte Dixon & Cardus* . . . p. 291

LANDLORD.]—See *Disclaimer*.

LEASE.]—See *Disclaimer*.

MARRIED WOMAN—*Bankruptcy Notice against*.]—A married woman who does not carry on a trade separately from her husband is not subject to the bankruptcy laws; and a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, cannot be served upon her. *In re Gardiner, Ex parte Coulson* . . . . . p. 1

*Settlement in Respect of*.]—(1) By a marriage settlement certain freehold property was vested in a trustee in trust for a married woman for life for her separate use, but without any restraint on anticipation, with remainder to such persons as she might by deed or will appoint, with remainder in default of appointment.

The married woman carried on a trade separately from her husband, and was adjudicated bankrupt under section 1, sub-section (5) of the Married Women's Property Act, 1882.

*Held* (LORD ESHER, M. R., dissenting): That the life estate passed to the trustee in the bankruptcy; and that the claim of the trustee to such estate did not "interfere with or affect the settlement" within the meaning of section 19 of the Married Women's Property Act. *In re Armstrong, Ex parte Armstrong* . . . . . p. 200

(2) Although a woman may know that a man is in embarrassed circumstances and that her marrying him at the time may be of service to him and preserve his property, if nevertheless her object in marrying him is not solely for the purpose of preserving his property, but for the ordinary reasons which lead men and women to take that position with regard to each other, an antenuptial settlement executed by the husband will not be void.

But where the marriage is not an honest marriage and is entered into solely for the purpose of attempting to make a settlement valid which otherwise would be void, and where but for a desire to defraud the creditors no marriage between the parties would have taken place, the antenuptial settlement will be set aside.

Thus where a man executed an antenuptial settlement and married a woman with whom he had had an immoral intimacy and the evidence showed that such marriage was entered into solely with intent to defraud his creditors, the wife being implicated in the transaction

*Held*: That the settlement was fraudulent and void as against the creditors. *In re Pennington, Ex parte Cooper* . . . . . p. 216

(3) Where there is evidence of an intent to defeat and delay creditors, and to

make the celebration of a marriage a part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement.

An antenuptial settlement, therefore, will be set aside under 13 Eliz. c. 5, if the Court comes to the conclusion on the evidence that the marriage was entered into and the settlement executed for the purpose of defeating the creditors of the settlor. *In re Pennington, Ex parte Pennington* . . . . . p. 268

**MORTGAGE.**—(1) Leave having been given to the trustee in a bankruptcy to disclaim the bankrupt's interest in certain leases, it was at the same time ordered, on the application of the landlord, that unless the executor of a mortgagee by subdemise of the bankrupt's interest should, within seven days, elect to accept an order vesting in him the disclaimed property, subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property.

*Held* : That the Court had power to make the order on the application of the landlord ; and that, subject to a formal amendment making it clear that a vesting order might be taken as to all or none or any one or two of the leases, the order made was right.

The case of *In re Parker & Parker, Ex parte Turquand* (see *ante*, Vol. I. p. 275 ; L. R. 14 Q. B. D. 405 ; 51 L. T. 667 ; 33 W. R. 752) commented on. *In re Cock, Ex parte Shilson* . . . . . p. 14

(2) Where a trustee in bankruptcy disclaims leasehold property of the bankrupt which the bankrupt has mortgaged by subdemise, the Court has power under section 55 of the Bankruptcy Act, 1883, to make an order on the application of the original lessor excluding the sub-lessee from all interest in and security upon the property unless he elects to take a vesting order vesting the property in him subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of such property at the date of the filing of the bankruptcy petition.

*Quære* : Whether if such a vesting order is made the sub-lessee will become liable as if he were an assignee, or whether he will become liable under the original lease as if he had been the original lessee.

The case of *In re Cock, Ex parte Shilson* (see *ante*), approved and followed. *In re Finley, Ex parte Hanbury* . . . . . p. 248

(3) An indenture of mortgage contained a clause whereby the mortgagor attorned and became tenant from quarter to quarter to the mortgagee in respect of the premises at a yearly rent by equal quarterly payments, the first payment to be made on the first day of the month next after any interest thereby secured should have become in arrear, but all money received by the mortgagee for rent due under the attornment, to be accepted in the first place in or towards satisfaction of the interest then in arrear : provided that the attornment should not make it compulsory on the mortgagee to collect the rent payable thereunder, and that she should not be accountable to a second mortgagee or any subsequent incumbrancer for any rent that might have been recovered under such attorn-

ment : and provided that the mortgagee might at any time after she was by law empowered to sell enter upon and take possession of the premises and determine the tenancy.

A bankruptcy petition was subsequently presented against the mortgagor, upon which he was adjudicated bankrupt, but between the presentation of such petition and the adjudication, the mortgagee distrained under the tenancy created by the attornment, and realised the sum of 1,715*l*.

*Held* (LORD ESHER, M. R., doubtful) : That the clause in question fell within section 6 of the Bills of Sale Act, 1878, but did not come within the proviso to the said section ; and that the trustee in the bankruptcy was entitled to the money realised. *In re Willis, Ex parte Lady Willoughby de Eresby* . p. 189

**OFFICIAL RECEIVER—*Locus of.***—On February 11th, 1888, a receiving order was made against a husband and wife jointly on their joint petition, but on discovery by the official receiver that the debtors had not traded jointly or in partnership, the joint receiving order was, on February 23rd, 1888, rescinded, and separate receiving orders and orders of adjudication were made against each of the debtors individually.

An objection was taken by the Board of Trade to the insertion in the *Gazette* of two receiving orders against two persons not being in partnership, and petitioning the Court under one petition ; and on March 15th, 1888, an application was made by the official receiver to the Court to rescind the receiving order and adjudication against the husband, it being shown that he had no assets, and had acted only as manager in the wife's business.

*Held* : (1) That the official receiver, either as official receiver or as trustee, had *locus standi* to apply to the Court to have the receiving order and adjudication against the husband rescinded.

(2) That the Court had power to rescind the receiving order and adjudication ; and that it was the duty of the Court under the circumstances to do so, and to amend the petition by striking out the husband's name. *In re Bond & Bond, Ex parte the Official Receiver* . . . . . p. 146

***Payment of Fees by.***—The exemption of the official receiver from payment of the prescribed fee of 5*s*. on every application to the Court applies only where an application is made by him in his capacity of official receiver, and does not extend to cases where application is made to the Court by the official receiver as trustee in bankruptcy. *In re Whitaker, Ex parte the Trustee* . . . . . p. 178

**ORDER OR DISPOSITION.]**—A custom exists in the printing trade to let printing machinery on hire so as to exclude the doctrine of reputed ownership in the event of the bankruptcy of the hirer.

But such custom does not at present extend so as to include the hiring of type. *In re Thackrah, Ex parte Hughes & Kimber* . . . . . p. 235

**“ORDINARILY RESIDED IN ENGLAND.”**—Where a debtor who was not domiciled in or had a dwelling-house or place of business in England, had for eighteen months previous to the presentation of a bankruptcy petition

against him, a room at an hotel in London which he paid for continuously during that time, and was treated as an ordinary resident there.

*Held*: That the said debtor had "ordinarily resided in England" within the meaning of section 6, sub-section 1 (d) of the Bankruptcy Act, 1883; and that the creditor was entitled to present a bankruptcy petition against him. *In re Norris, Ex parte Reynolds* . . . . . p. 111

PERCENTAGE.]—See *Costs*.

PETITION—*Purchase of Debt on which to found.*]—The purchase of a debt in order to found a bankruptcy petition upon it does not necessarily constitute under all circumstances an abuse of the process of the Bankruptcy Court.

Where, however, the bankruptcy law is put in force for an illegitimate purpose, and the Court sees that such petition is presented, not with the *bond fide* view of obtaining an adjudication, but for some collateral purpose, or with the view of putting pressure on the debtor, it will refuse to make a receiving order.

But where a debtor committed an act of bankruptcy by departing from his dwelling-house, and the debt of one creditor was purchased by another whose own debt was insufficient to found bankruptcy proceedings, in order to present a petition against such debtor for the *bond fide* purpose of having the debtor's property taken care of and the assets distributed amongst the creditors.

*Held*: That the petition was not an abuse of the process of the Court; and that a receiving order was rightly made. *In re Baker, Ex parte Baker* . . . p. 5

*Amount of Debt to support.*]—The costs of issuing an abortive execution cannot be added to a judgment debt so as to make up the amount necessary to enable a creditor to present a bankruptcy petition against the debtor under section 6 of the Bankruptcy Act, 1883. *In re Long & Co., Ex parte Long & Co.* . . . p. 29

*Against Debtor ordinarily residing in England.*]—Where a debtor who was not domiciled in or had a dwelling-house or place of business in England, had for eighteen months previous to the presentation of a bankruptcy petition against him, a room at an hotel in London which he paid for continuously during that time, and was treated as an ordinary resident there.

*Held*: That the said debtor had "ordinarily resided in England" within the meaning of section 6, sub-section 1 (d) of the Bankruptcy Act, 1883; and that the creditor was entitled to present a bankruptcy petition against him. *In re Norris, Ex parte Reynolds* . . . . . p. 111

*By Debtor.*]—(1) Where the bankruptcy petition has been presented by the bankrupt himself, the Court has no power to order the prosecution of such bankrupt for offences alleged to have been committed by him under section 11, sub-sections 13, 14, and 15 of the Debtors Act, 1869, within four months next before the presentation of such petition.

The said sub-sections only make the acts therein specified criminal offences if done by the debtor "within four months next before the presentation of a bankruptcy petition against him;" and they are not extended by section 163, sub-

section (1) of the Bankruptcy Act, 1883, by which only the words "if after the presentation of a bankruptcy petition by or against him" are substituted for the words "if after the presentation of a bankruptcy petition against him." *In re Burden, Ex parte Wood* . . . . . p. 166

(2) *Quære*: Whether a debtor who has only one creditor is entitled to file his own petition under the Bankruptcy Act, 1883.

But where the petition and adjudication were both unchallenged, and on application by the bankrupt for his discharge it was alleged against him that by reason of the fact that he had only one unsecured creditor the filing of the petition was an act of misconduct on his part which the Court was bound to take into consideration.

*Held*: That the petition and adjudication having been both unchallenged the Registrar was right in refusing to consider the alleged matter on application for discharge. *In re Bullen, Ex parte Arnaud* . . . . . p. 243

*By Company*.]—Where a bankruptcy petition presented by a company under section 148 of the Bankruptcy Act, 1883, was not accompanied by the affidavit required by Rule 258 of the Bankruptcy Rules, 1886, stating that the person presenting the petition was the authorised public officer or agent of such company.

*Held*: That the petition was rightly refused. *In re Cripps, Ross & Co., Ex parte Ross* . . . . . p. 226

*Joint*.]—On February 11th, 1888, a receiving order was made against a husband and wife jointly on their joint petition, but on discovery by the official receiver that the debtors had not traded jointly or in partnership, the joint receiving order was on February 23rd rescinded, and separate receiving orders and orders of adjudication were made against each of the debtors individually.

An objection was taken by the Board of Trade to the insertion in the *Gazette* of two receiving orders against two persons not being in partnership, and petitioning the Court under one petition; and on March 15th, 1888, an application was made by the official receiver to the Court to rescind the receiving order and adjudication against the husband, it being shown that he had no assets, and only acted as manager in the wife's business.

*Held*: (1) That the official receiver, either as official receiver or as trustee, had *locus standi* to apply to the Court to have the receiving order and adjudication against the husband rescinded.

(2) That the Court had power to rescind the receiving order and adjudication: and that it was the duty of the Court under the circumstances to do so, and to amend the petition by striking out the husband's name. *In re Bond & Bond, Ex parte the Official Receiver* . . . . . p. 146

**PREFERENCE.**—See *Fraudulent Preference*.

**PROOF**—*Of Creditor resident Abroad*.]—Where the proof of a creditor residing abroad is rejected by the trustee in a bankruptcy, and from such rejection the creditor appeals, the Court has no jurisdiction to order such creditor to give security for the costs of the appeal. *In re Vanderhaage, Ex parte Izard* . p. 27



*For Commission.*—On January 7th, 1887, an estate agent, in whose hands the debtor had placed certain property for sale, introduced to such debtor a person with a view to purchase, but no agreement could then be come to as to terms; and the debtor a few days afterwards presented his own petition in bankruptcy.

On January 17th, 1887, further negotiations took place between the person so introduced and the trustee in bankruptcy in respect of the property, and on January 24th, 1887, the purchase was completed, but a proof subsequently tendered by the estate agent for his commission was rejected by such trustee.

*Held:* That the sale was brought about in consequence of the introduction, and was traceable thereto; and that the proof for commission must be allowed. *In re Beale, Ex parte Durrant* . . . . . p. 37

*By Parties to Assignment Deed.*—On September 1st, 1887, the debtor executed a deed of assignment for the benefit of all his creditors, to which the respondent to the present appeal was a party, being a creditor and also trustee under the said deed, which contained a clause releasing the debtor from "all debts, claims, and demands whatsoever," which they the said releasing parties had against him up to the date thereof.

On September 23rd, 1887, a bankruptcy petition was presented against the debtor by a creditor who had refused to sign the deed, the act of bankruptcy alleged being its execution, and on October 1st, 1887, a receiving order was made.

The official receiver as trustee disallowed the proofs tendered by the creditors who had signed the deed, amongst others that of the present respondent, on the ground that by executing it they had released their debts, but the proofs were subsequently allowed by the County Court Judge, from whose decision the official receiver appealed.

*Held:* That the question was one of intention: that the intention was that the deed was not to operate in the event of bankruptcy, and the release was to hold good in case the consideration for which it was given should hold good, and not otherwise; and that the creditor was entitled to prove. *In re Stephenson, Ex parte the Official Receiver* . . . . . p. 44

*Application to Expunge.*—Where application was made under Rule 25 of Schedule II. of the Bankruptcy Act, 1883, by one creditor in the bankruptcy to reduce or expunge the proof of another creditor, but it was shown that such application, although made in the name of the creditor, was in reality for the benefit and on behalf of the bankrupt.

*Held:* That it is not permissible to use the process of the Court to do indirectly that which the process of the Court will not allow to be done directly; and that the application must be dismissed. *In re Tallerman, Ex parte Rooney* . . p. 119

*Rejection of.*—A proof in respect of money lent tendered against the estate by the father of the bankrupt was rejected by the trustee on the ground that no notice of the alleged debt appeared in the bankrupt's books of account, and that in any event it was barred by the Statute of Limitations.

*Held:* That by reason of a letter written by the bankrupt to his father four years previous to the bankruptcy, in which the debt was acknowledged, the Statute of Limitations did not apply; and that upon the evidence before it,

the Court would not be justified in saying that the claim of the father was not a *bonâ fide* one.

But that the Court could not be insensible to the fact that the difficulty which had arisen was in great measure due to the conduct of the creditor himself in allowing his debt to remain without formal acknowledgment or entry in the books, by reason of which the trustee had been compelled to come to the Court in the course of his duty; and that although an order would be made allowing the proof, such order must be without costs, the trustee to take his costs out of the estate. *In re Des Vignes, Ex parte Des Vignes* . . . . . p. 143

**PURCHASE—Of Debt on which to found Petition.]—See *In re Baker, Ex parte Baker* . . . . . p. 5**

**RASH AND HAZARDOUS.]—See *Speculation*.**

**RECEIVING ORDER—In lieu of Committal.]—An order for alimony *pendente lite*, followed by a further order for permanent alimony, having been made in the Divorce Court, and the sum of 130*l.* being due from the husband under these orders, a judgment summons in respect thereof was issued by the wife.**

*Held*: That in such case a receiving order in lieu of committal could not be made by the Court under section 103, sub-section (5) of the Bankruptcy Act, 1883, the wife not being strictly a "judgment creditor."

But that she was entitled to come to the Court under section 5 of the Debtors Act, 1869; and that an order directing payment of the sum due by instalments of 10*l.* a month should be made. *In re Otway, Ex parte Otway* . . . . . p. 115

*Appeal from.*]—On March 3rd, 1888, a receiving order was made in the County Court against a debtor who had failed to comply with the terms of a bankruptcy notice requiring him to pay a judgment debt, but a compromise having been subsequently agreed upon between the petitioning creditors and the debtor, application was made by the debtor, with the consent of the petitioning creditors, to the Divisional Court in Bankruptcy to rescind the receiving order on the terms of such compromise.

*Held*: That the Court had no jurisdiction to entertain such an application: and that the application was wrong in form.

But that under the circumstances the Court would allow the debtor to proceed with the case in the form of an appeal from the order of the County Court, it being alleged that the County Court registrar had wrongly refused to allow the debtor to go behind the judgment and enquire into the consideration of the judgment debt upon which the bankruptcy notice had been founded.

*Held*: That no facts had been brought to the notice of the County Court registrar which would afford any grounds for going behind the judgment; and that he was right in refusing to do so and in making the receiving order as prayed. *In re Shurly, Ex parte Shurly* . . . . . p. 158

*Application to stay.*]—Although an application for a stay of proceedings under a receiving order ought properly to be made to a Divisional Court in Bankruptcy, as the Court of Appeal pointed out by Order LVIII., Rule 16, of the

Rules of the Supreme Court, 1883, it would seem that where both parties consent an application of this nature will be heard by the Bankruptcy Judge when sitting alone. *In re Carter, Ex parte Carter* . . . . . p. 284

**REPUTED OWNERSHIP.]**—A custom exists in the printing trade to let printing machinery on hire so as to exclude the doctrine of reputed ownership in the event of the bankruptcy of the hirer.

But such custom does not at present extend so as to include the hiring of type. *In re Thackrah, Ex parte Hughes & Kimber* . . . . . p. 235

**REVIEW.]**—The meaning of section 104, sub-section (1) of the Bankruptcy Act, 1883, is that where a Court having bankruptcy jurisdiction makes an order in bankruptcy, the same Court may review, rescind, or vary such order; but no right is given to a County Court Judge to review, rescind or vary an order in bankruptcy which has been made by the registrar of such County Court.

On September 17th, 1887, a bankruptcy petition was presented against the debtor, the act of bankruptcy alleged being the execution on July 7th, 1887, of a deed of assignment for the benefit of his creditors generally, but on October 11th, 1887, this petition was dismissed by the County Court registrar on the ground that the petitioning creditors, by assenting to the said deed, had precluded themselves from relying upon it as an act of bankruptcy.

On January 7th, 1888, an order was made by the County Court Judge rescinding the registrar's order by which he dismissed the petition, and substituting other creditors who had not assented to the deed as petitioning creditors under section 107 of the Bankruptcy Act, 1883.

*Held:* (1) That the County Court Judge had no power to review or rescind the order made by the registrar.

(2) That under the circumstances the order made by the County Court Judge substituting other creditors as petitioning creditors was not warranted by any section of the Bankruptcy Act.

(3) That even if jurisdiction had been given to the County Court Judge to make the order he did, he ought not, on the facts of the case to have made such order. *In re Maughan, Ex parte Maughan* . . . . . p. 152

**SCHEME OF ARRANGEMENT—Approval of Court of.]**—(1) It is not right to lay down a general doctrine to apply to all schemes of arrangement that adequate security for the carrying out of a proposed scheme is absolutely essential, and that the absence of such adequate security must in all cases preclude the Court from granting its approval; although where some guarantee might reasonably be expected this fact ought to be taken into consideration.

Thus, where the debtors were merchants having a house of business in England and a house in South America, the assets forming the principal part of the estate being in South America, out of the jurisdiction of the Court, and a scheme of arrangement was proposed for a sale of these assets to one of the partners who resided in South America for about their estimated value, on terms that the purchase-money should be paid by quarterly instalments extending over four years, the purchaser's life to be insured by the trustee for about one-

sixth of the amount payable, there being no other provision as to security, but the scheme was recommended by a responsible committee of inspection who were creditors for a large amount, and by an accountant who had been sent out to South America for the purpose of investigation, while the official receiver reported in favour of the said scheme.

*Held:* That under the circumstances of the case the proposed scheme was reasonable, and calculated to benefit the general body of creditors; and that the approval of the Court ought to be granted. *In re Staniar, Roberts, & Co., Ex parte Smith* . . . . . p. 67

(2) Where application is made to the Court to approve a composition or scheme, it is the duty of the Court to take into consideration not only the wishes of the creditors, but also the conduct of the debtor and the requirements of commercial morality.

In the case of a trader, the Court must look at the conduct of the debtor with reference to his trading; and where by such conduct it is clearly shown that the debtor is not a fit person to carry on business, the Court ought to refuse its approval.

Thus where a debtor carried on business and became bankrupt, paying no dividend, and after two years started in business again in a partnership into which he brought no capital, and failed, a dividend of 3s. 3d. in the pound being paid, and his discharge was absolutely refused for offences under the Bankruptcy Act; but such debtor subsequently offered, and the majority of the creditors accepted, a composition of one shilling in the pound, on payment of which the bankruptcy was to be annulled.

*Held:* That the Court was right in refusing to approve such composition. *In re McTear, Ex parte McTear* . . . . . p. 182

*Jurisdiction of Court to Accept.*—Section 18 of the Bankruptcy Act, 1883, was intended to indicate the general course of practice that after a receiving order has been made a bankruptcy shall go on in the ordinary way unless it is stopped by the effect of a composition or scheme of arrangement under that section; and although an absolute rule has not been laid down that there is no possible scheme of arrangement or composition outside that on the footing of which the Court may not properly discharge the receiving order, yet the Court will not be willing to go beyond the usual course of practice, and must be thoroughly satisfied of the necessity of doing so before it can entertain any application for a composition or scheme of arrangement outside section 18.

Where after a receiving order had been made against the debtors on their own petition a scheme was put forward by them which the creditors were willing to accept, and the debtors thereupon with the assent of the creditors applied to have the receiving order rescinded on the ground that the proposed scheme of arrangement was not one which could be carried out under the provisions of the Bankruptcy Act.

*Held:* That the application to rescind the receiving order was rightly refused; and that if the debtors were desirous of substituting a scheme their proper course was to proceed in the manner provided under section 18 of the Bankruptcy Act, 1883. *In re Dixon & Cardus, Ex parte Dixon & Cardus* . . . p. 291

**SETTLEMENT—Marriage.]**—By a marriage settlement certain freehold property was vested in a trustee in trust for a married woman for life for her separate use, but without any restraint on anticipation, with remainder to such persons as she might by deed or will appoint, with remainder in default of appointment.

The married woman carried on a trade separately from her husband, and was adjudicated bankrupt under section 1, sub-section (5) of the Married Women's Property Act, 1882.

*Held* (LORD ESHER, M.R., dissenting): That the life estate passed to the trustee in the bankruptcy; and that the claim of the trustee to such estate did not "interfere with or affect the settlement" within the meaning of section 19 of the Married Women's Property Act. *In re Armstrong, Ex parte Armstrong* . . . . . p. 200

**Antenuptial.]**—(1) Although a woman may know that a man is in embarrassed circumstances and that her marrying him at the time may be of service to him and preserve his property, if nevertheless her object in marrying him is not solely for the purpose of preserving his property, but for the ordinary reasons which lead men and women to take that position with regard to each other, an antenuptial settlement executed by the husband will not be void.

But where the marriage is not an honest marriage, and is entered into solely for the purpose of attempting to make a settlement valid which otherwise would be void, and where but for a desire to defraud the creditors no marriage between the parties would have taken place, the antenuptial settlement will be set aside.

Thus where a man executed an antenuptial settlement and married a woman with whom he had had an immoral intimacy, and the evidence showed that such marriage was entered into solely with intent to defraud his creditors, the wife being implicated in the transaction.

*Held*: That the settlement was fraudulent and void as against the creditors. *In re Pennington, Ex parte Cooper* . . . . . p. 216

(2) Where there is evidence of an intent to defeat and delay creditors, and to make the celebration of a marriage a part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement.

An antenuptial settlement therefore will be set aside under 13 Eliz. c. 5, if the Court comes to the conclusion on the evidence that the marriage was entered into, and the settlement executed for the purpose of defeating the creditors of the settlor. *In re Pennington, Ex parte Pennington* . . . . . p. 268

**SHARES—Attachment of.]**—Where a judgment creditor who had served a bankruptcy notice on the debtor under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, within the seven days allowed for complying with the notice obtained a charging order on certain shares belonging to the debtor.

*Held*: That by so attaching the shares the creditor had not prevented the debtor from paying the judgment debt; and that the debtor was not entitled to have the bankruptcy notice set aside.

In such case the question must be whether the creditor by what he has done has in fact prevented the debtor from complying with the notice; and if all that the creditor has done is to make it more difficult but not to prevent the payment it is not sufficient. *In re Sedgwick, Ex parte Sedgwick* . . . . . p. 262

SHERIFF.]—See *Execution*.

**SOLICITOR—Costs of.**—(1) On April 6th, 1887, an order was made directing the receiver appointed in a partnership action in the Chancery Division which had been transferred to the Bankruptcy Court, to pay over the balance of moneys in his hands to the solicitor in the action in respect of his taxed costs.

On January 11th, 1888, the Court on an application by the receiver for directions in view of a claim made by the landlord of premises occupied by the bankrupts for rent, varied its order of April 6th to the extent that the amount due to the landlord should be paid to him, and the remainder to the solicitor.

The moneys in the receiver's hands were not sufficient to pay the solicitor in full, and a claim to priority over the landlord was made by him.

*Held:* (1) That the order of April 6th, 1887, being made by the Judge sitting as a Judge of the High Court and not in Bankruptcy, that order could not be reheard by him and varied. (2) That under section 28 of the Solicitors' Act, 1860, the solicitor's charge was entitled to priority over everything except the claim of a *bond fide* purchaser for value without notice; and that as the landlord did not fill that character, the solicitor was entitled to priority over him. *In re Suffield & Watt, Ex parte Wiggins* . . . . . p. 83

(2) The official receiver as trustee in the bankruptcy entered into a contract for the sale of certain property of the bankrupt which was subject to a mortgage. Such sale was duly completed, the mortgagee executing a reconveyance and his debt being paid out of the purchase money.

On taxation a percentage on the whole amount received for the said property was allowed by the County Court Registrar to the solicitors who acted for the official receiver in carrying out the sale.

*Held:* That the percentage so allowed was right: that the meaning of the proviso in Rule 2 of Section VII. Part II. of the Appendix to the Bankruptcy Rules, 1886, is, that the percentage is not to be paid twice over: and that as in the present case no part of the proceeds of sale were chargeable with a percentage by the mortgagee's solicitors, the vendor's solicitors were entitled to the whole percentage.

*Quere:* Whether any circumstances can arise under which the mortgagee's solicitors would be entitled to a percentage. *In re Gallard, Ex parte Harris* p. 123

(3) Although under section 57, sub-section (3) of the Bankruptcy Act, 1883, a trustee may with the permission of the committee of inspection employ a solicitor to do "any business which may be sanctioned by the committee," where a solicitor so employed only does administrative work he is not entitled to charge solicitor's charges in respect thereof, but only such charges as are fair and reasonable having regard to the work so done. *In re Pryor, Ex parte The Board of Trade* . . . . . p. 232

*In Small Bankruptcy.*—Rule 112 of the Bankruptcy Rules, 1886, which provides that where the estimated assets of a debtor do not exceed the sum of three hundred pounds a lower scale of solicitor's costs shall be allowed in all proceed-

ings under the Act in which costs are payable out of the estate, applies to costs which, by the provisions of the Act, are payable out of the estate.

But the rule does not apply to costs which are in the discretion of the Court, and which in consequence of the Court exercising its discretion in one particular way may come to be paid out of the estate.

The rule, therefore, does not apply to proceedings against third parties outside the bankruptcy. *In re Dowson, Ex parte Jaynes* . . . . . p. 240

*Privilege of.*—Where the address of a person has been concealed and is only known to his solicitor because the client has communicated it to him confidentially, as his solicitor, for the purpose of being advised by him, such address is a matter of professional confidence and the solicitor is not bound to disclose it.

Thus where at a private examination before the Registrar the solicitor of a bankrupt refused to answer a question as to the present address of the bankrupt who had absconded, on the ground that the address had been given to him for the sole purpose of advising the debtor in the bankruptcy proceedings.

*Held:* That the solicitor was within his rights in refusing to answer the question and would not be compelled to do so. *In re Arnott, Ex parte Chief Official Receiver* . . . . . p. 286

**SPECULATION—*Rash and Hazardous.***—On application by a bankrupt for his discharge the official receiver reported that such bankrupt had brought himself within the provisions of section 28, sub-section (3) of the Bankruptcy Act, 1883, in that he had been guilty of rash and hazardous speculations by reason of certain gambling transactions in connection with the Stock Exchange.

The County Court Judge refused to grant any order of discharge whatever.

*Held* (on appeal): That under the circumstances, and taking into consideration the facts that the bankrupt was not a trader and that only one of the offences specified in section 28, sub-section (3) had been reported against him, the proper order would be to suspend the order of discharge for a period of three years. *In re Rankin, Ex parte Rankin* . . . . . p. 23

**STAY OF PROCEEDINGS—*Application for.***—Although an application for a stay of proceedings under a receiving order ought properly to be made to a Divisional Court in Bankruptcy as the Court of Appeal pointed out by Order LVIII. Rule 16 of the Rules of the Supreme Court, 1883, it would seem that where both parties consent an application of this nature will be heard by the Bankruptcy Judge when sitting alone. *In re Carter, Ex parte Carter* . . p. 284

**TAXATION.**—See *Costs*.

**TRANSFER—*of Proceedings.***—An application for the transfer of bankruptcy proceedings from the London Court of Bankruptcy to the County Court is an application which should be made to the Bankruptcy Judge at Chambers. *In re Williams, Ex parte The Chief Official Receiver* . . . . . p. 103

*Of Pending Actions to Bankruptcy Judge.*—On application by the trustee

under section 102, sub-section (4) of the Bankruptcy Act, 1883, to transfer to the Judge in Bankruptcy three actions pending in the Queen's Bench Division of the High Court, in the first of which the bankrupt was plaintiff and in the other two the defendant in the first action was suing the bankrupt.

*Held*: That the order to transfer ought not to be made, since no advantage would be derived from such transfer, and the trial of the first action to which alone the trustee had made himself a party and in which the defendant had been ordered to pay money into Court would be thereby delayed. *In re Ross, Ex parte the Trustee* . . . . . p. 281

**TRUSTEE—Objection to Appointment of.]**—On October 1st, 1887, a deed of assignment was executed by a debtor for the benefit of his creditors, under which a trustee was appointed who dealt with the estate.

On December 10th, 1887, a petition was presented against the debtor upon which a receiving order was made and the debtor adjudged bankrupt, the act of bankruptcy alleged being the execution of the said deed.

On February 11th, 1888, by a special resolution of the creditors the trustee under the said deed of assignment was appointed trustee in the bankruptcy, but the Board of Trade under section 21, sub-section (2) of the Bankruptcy Act, 1883, objected to this appointment on the ground that the connection of the person so appointed with the bankrupt's estate made it "difficult for him to act with impartiality in the interest of the creditors generally," it being alleged (1) that he had dealt with the estate of the bankrupt with notice of the act of bankruptcy on which adjudication was made: (2) that he was accountable to the trustee in the bankruptcy in respect of such dealings: (3) that he had in his hands moneys forming part of the property of the bankrupt which he had failed to pay over, and that the question in respect thereof could only be ascertained by an investigation instituted by some other independent trustee.

*Held*: That the objection must be sustained: that the person so appointed trustee had put himself into the position in which he would have to decide between his own interests and the claims of the creditors: and that upon the facts brought to the notice of the Court beyond proof that it was difficult for him to exercise strict impartiality there was reason to suspect that he had already failed in doing so. *In re Martin, Ex parte The Board of Trade* . . . p. 129

**Examination of.]**—The property of the bankrupt, consisting of a certain mill, was sold by the trustee to the bankrupt's brother for the sum of 1,100*l.*, being sufficient to pay all the creditors whose names were set out in the statement of affairs, and of whom notice had been received, their debts in full.

After the assets had been distributed the fact of the bankruptcy was ascertained by a creditor for 396*l.*, whose name the bankrupt had failed to insert in his statement, and it being admitted that a better price might probably have been obtained for the property sold than that actually realised, application was made to the Court by such creditor under section 27 of the Bankruptcy Act, 1883, for an order for the examination of the trustee, the bankrupt, and his brother in respect of the sale proceedings.

*Held*: That the creditor was entitled to make such application; and that an



order ought to be made by the Court directing the examination of the bankrupt and his brother.

But that in the absence of any evidence of *mala fides* or collusion there was nothing to justify the Court in making an order against the trustee.

Where application is made under section 27 of the Bankruptcy Act, 1883, for the examination of a trustee in bankruptcy, it would seem that notice of such application should be served on the trustee. *In re Whicher, Ex parte Stevens* p. 173

*Cannot serve Bankruptcy Notice.*—The trustee in the bankruptcy of a judgment creditor is not a person entitled to issue a bankruptcy notice against the debtor in respect of the judgment debt under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883.

The legal personal representative of the judgment creditor is the only person, other than the judgment creditor himself, who can issue such notice. *In re Goldring, Ex parte Harper* . . . . . p. 265

*Committal of.*—Where a trustee failed to pay into the Bankruptcy Estates Account certain moneys which had come into his hands in respect of the estate of which he was trustee, or to comply with an order of the Board of Trade directing him forthwith to pay over the said moneys, and the Board of Trade applied for an order to commit under section 102, sub-section (5) of the Bankruptcy Act, 1883.

*Held:* That an immediate order of committal must be made; but that such order would lie in the office for a week and not go out if within that time the trustee should pay into the Bankruptcy Estates Account the amount certified to be due from him together with the costs of the motion. *In re Nicholson, Ex parte The Board of Trade* . . . . . p. 278

**VESTING ORDER—On Application of Landlord.**—(1) Leave having been given to the trustee in a bankruptcy to disclaim the bankrupt's interest in certain leases, it was at the same time ordered, on the application of the landlord, that unless the executor of a mortgagee by subdemise of the bankrupt's interest, should within seven days elect to accept an order vesting in him the disclaimed property, subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property.

*Held:* That the Court had power to make the order on the application of the landlord; and that, subject to a formal amendment making it clear that a vesting order might be taken as to all or none or any one or two of the leases, the order made was right. *In re Cock, Ex parte Shilson* . . . . . p. 14

(2) Where a trustee in bankruptcy disclaims leasehold property of the bankrupt which the bankrupt has mortgaged by subdemise, the Court has power under section 55 of the Bankruptcy Act, 1883, to make an order on the application of the original lessor excluding the sub-lessee from all interest in and security upon the property unless he elects to take a vesting order, vesting the property in him, subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of such property at the date of the filing of the bankruptcy petition,

*Quere.* Whether if such a vesting order is made the sub-lessee will become liable as if he were an assignee, or whether he will become liable under the original lease, as if he had been the original lessee. *In re Finley, Ex parte Hanbury*. . . . . p. 248

**WITNESS—Examination of.]—**(1) Where on examination before the Registrar under section 27 of the Bankruptcy Act, 1883, a witness objects to answer questions put to him, such witness cannot be made a respondent to an appeal against the decision of the Registrar refusing to order the witness to answer the said questions.

Although the answer of a witness summoned for examination under section 27 of the Bankruptcy Act, 1883, must in the end be accepted in so far that witnesses cannot be called to contradict him; yet the Court is not bound at once to accept the first answer as conclusive, but the witness may be further questioned in order to test his credibility.

The case of *Ex parte Rooke, In re Purvis* (56 L. T. 579) explained. *In re Scharrer, Ex parte Tilley*. . . . . p. 79

(2) In the case of a private examination before the Registrar under section 27 of the Bankruptcy Act, 1883, it is the duty of the Registrar to exercise some control over the persons who are conducting such examination, and if the questions put to a witness are such as ought not to be put and are clearly irrelevant or calculated to mislead such witness, it is the duty of the Registrar to interpose. *In re Pennington, Ex parte Pennington*. . . . . p. 268

**Privilege of Solicitor.]—**Where the address of a person has been concealed, and is only known to his solicitor because the client has communicated it to him confidentially, as his solicitor, for the purpose of being advised by him, such address is a matter of professional confidence, and the solicitor is not bound to disclose it.

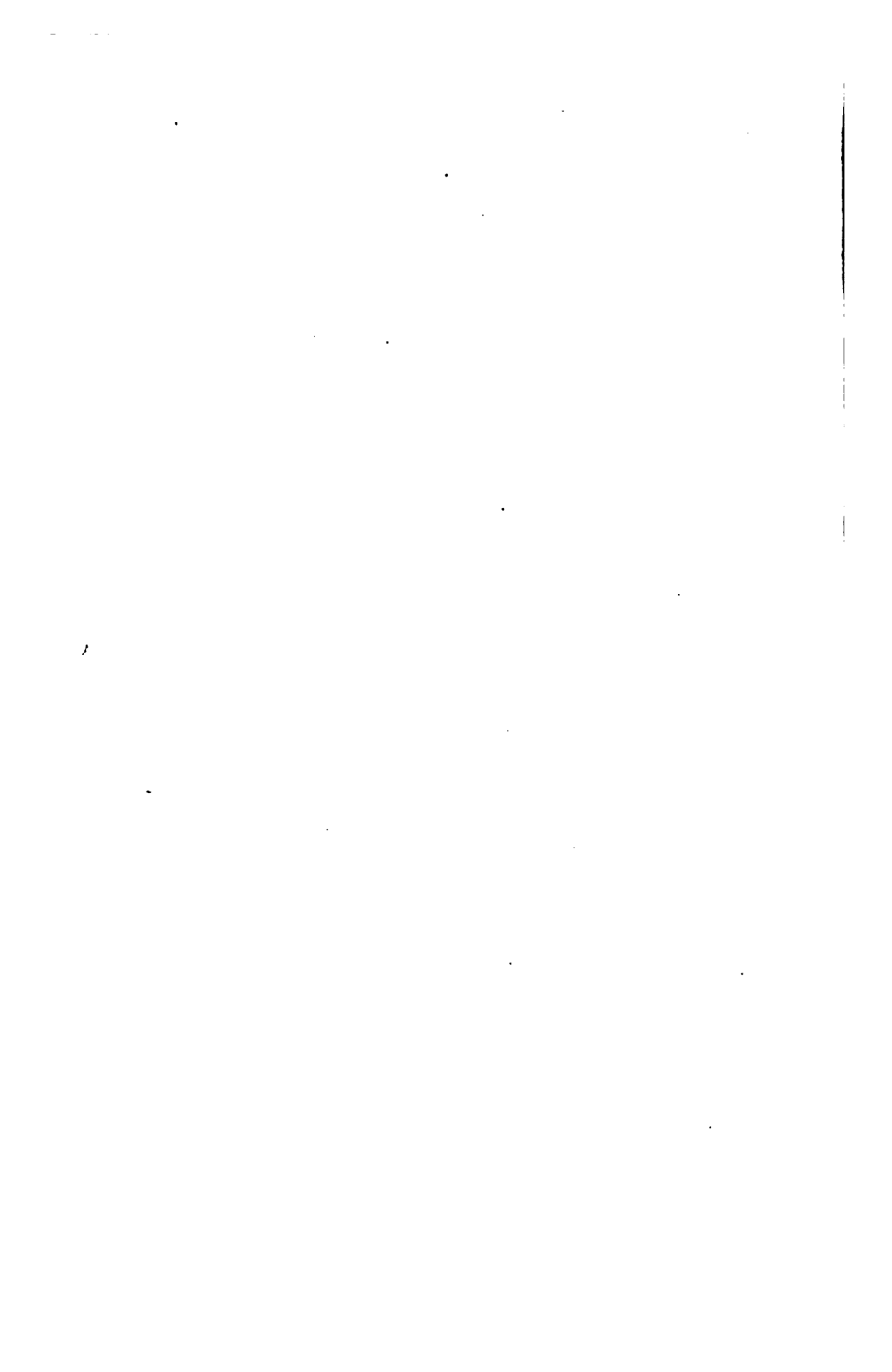
Thus where at a private examination before the Registrar the solicitor of a bankrupt refused to answer a question as to the present address of the bankrupt, who had absconded, on the ground that the address had been given to him for the sole purpose of advising the debtor in the bankruptcy proceedings.

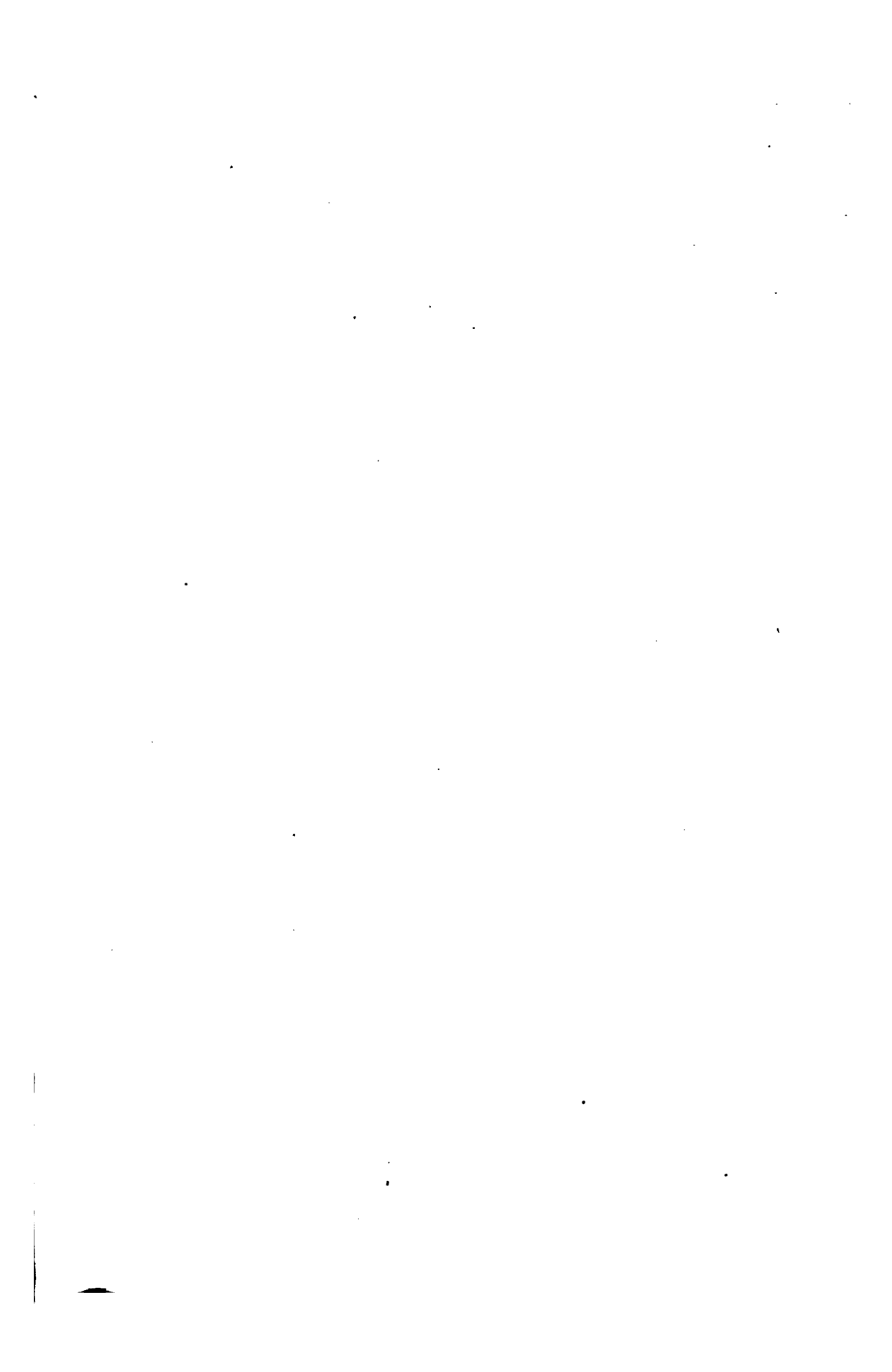
*Held:* That the solicitor was within his rights in refusing to answer the question, and would not be compelled to do so. *In re Arnott, Ex parte Chief Official Receiver*. . . . . p. 286

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